

University Casebook Series

ACCOUNTING—CORPORATION (Temporary Edition)

Robert Amory, Jr., Professor of Law, Harvard University.

ADMINISTRATIVE LAW, Second Edition

Felix Frankfurter, Associate Justice of the Supreme Court of the United States, and James F. Davison, Professor of Law, George Washington University.

ADMINISTRATIVE LAW, Second Edition

Walter Gellhorn, Professor of Law, Columbia University.

BUSINESS ASSOCIATIONS—CORPORATIONS

E. Merrick Dodd, Jr., Professor of Law, Harvard University, and Ralph J. Baker, Professor of Law, Harvard University.

BUSINESS ORGANIZATION: CORPORATIONS

A. A. Berle, Jr., Professor of Law, Columbia University, and William C. Warren, Professor of Law, Columbia University.

CIVIL PROCEDURE see Procedure

COMMERCIAL AND INVESTMENT PAPER

Roscoe T. Steffen, Professor of Law, Yale University School of Law.

COMMON LAW ACTIONS—Introduction to Civil Procedure (Forms of Actions)

Thomas E. Atkinson, Professor of Law, New York University, and James H. Chadbourn, Professor of Law, University of Pennsylvania.

CONFLICT OF LAWS, Second Edition, with 1947 Supplement

Elliott E. Cheatham, Professor of Law, Columbia University; Noel T. Dowling, Professor of Law, Columbia University; Herbert F. Goodrich, formerly Dean of the Law School, University of Pennsylvania, Judge, U. S. Circuit Court of Appeals, Third Circuit; and Erwin N. Griswold, Dean of the Law School, Harvard University.

CONSTITUTIONAL LAW, Third Edition

Noel T. Dowling, Harlan Fiske Stone Professor of Constitutional Law, Columbia University.

CONSTITUTIONAL LAW

Henry Rottschaefer, Professor of Law, University of Minnesota.

CONTRACTS, Second Edition

Harold Shepherd, Dean of the Law School, Duke University.

CONTRACTS, Second Edition

Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University, and George W. Goble, Professor of Law, University of Illinois.

CREDITORS' RIGHTS, Fourth Edition, with 1948 Bankruptcy Act Pamphlet.

Volume 2, Receivership and Corporate Reorganization available separately
John Hanna, Professor of Law, Columbia University, and James Angell MacLachlan, Professor of Law, Harvard University.

CRIMINAL LAW AND ITS ADMINISTRATION

Jerome Michael, Professor of Law, Columbia University, and Herbert Wechsler, Professor of Law, Columbia University.

CRIMINAL LAW AND ITS ENFORCEMENT, Third Edition

John B. Waite, Professor of Law, University of Michigan.

DAMAGES

Charles T. McCormick, Dean of the Law School, University of Texas.

DOMESTIC RELATIONS, Second Edition, with 1947 Supplement

Albert C. Jacobs, Professor of Law, Columbia University.

EQUITY, Second Edition

Zechariah Chafee, Jr., Langdell Professor of Law, Harvard University, and Sidney Post Simpson, Professor of Law, New York University School of Law. In collaboration with John P. Maloney, Vice Dean of Law School, St. John's University.

ETHICS see Legal Profession

EVIDENCE, Second Edition

Edmund M. Morgan, Royall Professor of Law, Harvard University, and John M. Maguire, Professor of Law, Harvard University.

FEDERAL COURTS

Charles T. McCormick, Dean of the Law School, University of Texas, and James H. Chadbourn, Professor of Law, University of Pennsylvania.

INSURANCE, Second Edition

Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University.

INTRODUCTION TO LAW

Dowling, Patterson, and Powell's Materials on Legal Method, by Noel T. Dowling, Harlan Fiske Stone Professor of Constitutional Law, Columbia University, Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University, and Richard R. B. Powell, Dwight Professor of Law, Columbia University.

Beardsley and Orman's Legal Bibliography and the Use of Law Books, with Assignments and Problems, Second Edition, by Arthur S. Beardsley, Member of the Seattle Bar and formerly Law Librarian, University of Washington, and Oscar C. Orman, Lecturer in Legal Bibliography and formerly Director of Libraries, Washington University, St. Louis. Solutions to Assignments available.

LABOR LAW

Archibald Cox, Professor of Law, Harvard University.

LABOR LAW, Second Edition, with 1947 Supplement

James M. Landis, formerly Dean of the Law School, Harvard University, and Marcus Manoff, Member of the Massachusetts Bar.

LABOR RELATIONS

Harry Shulman, Professor of Law, Yale University, and Neil Chamberlain, Professor of Economics and Research Director of the Labor Management Center, Yale University.

LEGAL BIBLIOGRAPHY, Second Edition, with Assignments and Problems

Arthur S. Beardsley, formerly Professor of Law and Law Librarian, University of Washington, and Oscar C. Orman, formerly Professor of Law and Director of Libraries, Washington University.

LEGAL METHOD

Noel T. Dowling, Harlan Fiske Stone Professor of Constitutional Law, Columbia University; Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University; and Richard R. B. Powell, Dwight Professor of Law, Columbia University.

LEGAL PROFESSION

Elliott E. Cheatham, Professor of Law, Columbia University.

LEGISLATION

Horace E. Read, Professor of Law, University of Minnesota, and John W. MacDonald, Professor of Law, Cornell Law School.

MUNICIPAL CORPORATIONS, Third Edition

By the late Charles W. Tooke, Professor of Law, New York University, and John A. McIntire, Professor of Law, George Washington University.

NEGOTIABLE INSTRUMENTS see Commercial and Investment Paper

PROCEDURE—CIVIL PROCEDURE, Third Edition

Roswell Magill, Professor of Law, Columbia University, and James H. Chadbourn, Professor of Law, University of Pennsylvania. Part III on Jurisdiction, Process and Appearance, by Edmund M. Morgan, Royall Professor of Law, Harvard University.

PROCEDURE—CIVIL PROCEDURE

Paul R. Hays, Professor of Law, Columbia University.

PROCEDURE—CIVIL PROCEDURE

Thomas E. Atkinson, Professor of Law, New York University, and James H. Chadbourn, Professor of Law, University of Pennsylvania.

PROCEDURE—The Elements of Legal Controversy: An Introduction to the Study of Adjective Law

Jerome Michael, Professor of Law, Columbia University.

UNIVERSITY CASEBOOK SERIES—Continued

PROPERTY (Temporary Edition)

A. James Casner, Professor of Law, Harvard University, and W. Barton Leach, Professor of Law, Harvard University.

PROPERTY, Volume 1—REAL, Second Edition

Everett Fraser, Dean Emeritus of the Law School, University of Minnesota.

PROPERTY, Volume 2—PERSONAL AND REAL, Second Edition

Everett Fraser, Dean Emeritus of the Law School, University of Minnesota.

PROPERTY, Volume 3—CONVEYANCES, Second Edition

Marion R. Kirkwood, Professor of Law, Stanford University.

PROPERTY, Volume 4—FUTURE INTERESTS, Second Edition

W. Barton Leach, Professor of Law, Harvard University.

PROPERTY, Volume 5—WILLS AND ADMINISTRATION, Third Edition

Philip Mechem, Professor of Law, University of Pennsylvania, and Thomas E. Atkinson, Professor of Law, New York University.

QUASI CONTRACTS AND EQUITY (Rescission, Reformation and Quasi Contracts)

Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University.

SALES, Second Edition

George G. Bogert, James Parker Hall Professor of Law, University of Chicago, and William E. Britton, Professor of Law, University of Illinois.

SECURITY, Second Edition

John Hanna, Professor of Law, Columbia University, and Reporter on Security, American Law Institute.

TAXATION, Fourth Edition

Roswell Magill, Professor of Law, Columbia University, and John M. Maguire, Professor of Law, Harvard University.

TAXATION, FEDERAL, Second Edition, with 1948 Supplement

Erwin N. Griswold, Dean of the Law School, Harvard University.

TORTS

Harry Shulman, Sterling Professor of Law, Yale University, and Fleming James, Jr., La Fayette S. Foster Professor of Law, Yale University.

TRADE REGULATION, with 1947 Supplement

Milton Handler, Professor of Law, Columbia University.

TRUSTS

George G. Bogert, James Parker Hall Professor of Law, University of Chicago.

WILLS AND ADMINISTRATION see Property, Volume 5

University Casebook Series

EDITORIAL BOARD

EDMUND M. MORGAN

DIRECTING EDITOR

Royall Professor of Law, Harvard University

EVERETT FRASER

Dean of the Law School, University of Minnesota

ERWIN N. GRISWOLD

Dean of the Law School, Harvard University

ALBERT J. HARNO

Dean of the Law School, University of Illinois

MARION R. KIRKWOOD

Professor of Law, Stanford University

ROSWELL MAGILL

Professor of Law, Columbia University

CHARLES T. McCORMICK

Dean of the Law School, University of Texas

HAROLD SHEPHERD

Dean of the Law School, Duke University

HARRY SHULMAN

Professor of Law, Yale University

THE ELEMENTS OF LEGAL CONTROVERSY

AN INTRODUCTION TO THE STUDY OF
ADJECTIVE LAW

By

JEROME MICHAEL

Professor of Law in Columbia University

IIPA LIBRARY



19722



COLUMBIA UNIVERSITY

Brooklyn

THE FOUNDATION PRESS, INC.

1948

COPYRIGHT, 1948
BY
THE FOUNDATION PRESS, INC.

PREFACE

THE problem of the introductory or first course in the law of civil procedure is one of the oldest and, I think, has proved to be one of the most difficult and stubborn of the problems of legal education. This book is another effort to solve it.

I have attempted to explain the course which I have contrived in the Introduction which follows. Here I need add only that it is contemplated that the course will be given in the first year and preferably in the first session of the curriculum, and that my own experience and that of Professors John W. MacDonald and Delmar Karlen, who have been using the book in mimeographed form at Cornell and Wisconsin, shows that the course can be completed in forty-two hours by teachers who do not think it necessary to discuss each case in detail. I myself think it indefensible to use cases solely for the purpose of imparting information which can be as well imparted to students by text or lecture. If teachers who use this book will occasionally discuss cases as a group with their students or talk to their students about cases as a group, I think that they will have little difficulty in completing the course in the allotted time.

Finally, I wish to take advantage of the opportunity which a preface provides of acknowledging my indebtedness to other students and teachers of procedural law who have greatly influenced my own thinking and from whom I have learned much, and especially to Professor Edmund M. Morgan of Harvard Law School and Judge Charles E. Clark who, with characteristic generosity, were good enough to read and criticize this book in manuscript; to Professors Karlan and MacDonald for the encouragement which their faith in untried ideas gave me; to Dean Young B. Smith of my own Faculty for his unfailing moral and material support; to the staffs of the Mimeograph Office and of the Library of my School for the efficient assistance which they so cheerfully gave me; to the authors and publishers who have permitted me to quote from their works and publications; and to my own students who have taught as well as learned from me.

But, most of all, I am indebted to Professor Mortimer J. Adler of the University of Chicago, whom many years ago I had the great good fortune to have as a collaborator both in the field of criminal law and in the field of civil procedure. My association

PREFACE

with him was one of the richest intellectual experiences of my life, and I shall never cease to be grateful to him for what he taught me of moral philosophy, of the liberal arts and of psychology. In this book I have drawn freely not only upon the products of our collaboration but upon various books and essays of his.

JEROME MICHAEL

Columbia University, School of Law
September, 1948.

TABLE OF CONTENTS

TABLE OF CASES	Page XIII
TABLE OF STATUTES	XXIII
TABLE OF ARTICLES, BOOKS, ETC.....	XXVII
PART I. INTRODUCTION: THE OBJECTS OF THE COURSE	1
PART II. MODES OF RIGHTING LEGAL WRONGS.....	10
CHAPTER I. REMEDIES	10
Section	
1. Means of Obtaining Remedies	10
2. Restitution	14
3. Compensatory Damages	38
4. Specific Reparation	59
5. Preventing Legal Wrongs	69
CHAPTER II. THE AWARD OR DENIAL OF A REMEDY.....	79
Section	
1. The Form and Functions of a Judgment.....	79
2. Devices for Enforcing a Judgment	88
CHAPTER III. JUSTICIABILITY	94
Section	
1. The Conditions of Justiciability.....	94
2. The Declaratory Judgment.....	117
PART III. THE LEGAL AND FACTUAL CONDITIONS OF A REMEDY	132
BOOK I. THE PRIMACY OF THE SUBSTANTIVE LAW.....	132
CHAPTER IV. CAUSE OF ACTION AS A SUBSTANTIVE CON- CEPTION	132
Section	
1. Cause of Action as a Prima Facie Right to a Remedy	132
2. The Elements of a Cause of Action.....	144
BOOK II. STATING A CAUSE OF ACTION	158

TABLE OF CONTENTS

	Page
CHAPTER V. THE SUBSTANTIVE ADEQUACY OF THE FACTS STATED	158
Section	
1. Facts and Propositions	158
2. The Test of the Substantive Adequacy of the Facts Stated	170
3. Material and Immaterial Propositions.....	186
CHAPTER VI. THE PROCEDURAL REGULARITY OF THE STATEMENT OF FACTS	199
Section	
1. Ultimate Facts and Evidential Facts: Materi- ality and Relevancy	199
2. Ultimate Facts and Conclusions of Fact: Per- ceptual and Inferential Knowledge.....	212
3. Ultimate Facts and Conclusions of Law: Mat- ters of Fact and Matters of Law.....	217
PART IV. FORM AND SUBSTANCE	261
CHAPTER VII. FORMS OF ACTION	261
Section	
1. The Nature of a Form of Action.....	261
2. The Functions of the Original Writ.....	267
3. No Writ, No Right	274
4. The Dominance of the Original Writ.....	284
A. The Necessity of Choosing the Appropriate Form	284
B. The Necessity of Conformity of Declara- tion to Writ	302
CHAPTER VIII. UNIFICATION AND UNIFORMITY	308
Section	
1. A Critique of the Formulary System.....	308
2. Varieties of Statutes and Rules Providing for Unification and Uniformity	324
3. Do the Forms of Action "Still Rule Us from Their Graves"?	326
PART V. THE LEGAL AND FACTUAL CONDITIONS OF AVOIDING A REMEDY	363
BOOK I. DEFENSES IN POINT OF LAW.....	363

TABLE OF CONTENTS

	Page
CHAPTER IX. SUBSTANTIVE INADEQUACY	363
Section	
1. The General Demurrer and Its Analogues.....	363
2. Rules Regulating the Use of Devices for Inter- posing Defenses in Point of Substantive Law	375
CHAPTER X. PROCEDURAL IRREGULARITIES	407
Section	
1. The Special Demurrer and Its Analogues.....	407
2. The Confusion of Form and Substance.....	416
CHAPTER XI. THE FINALITY OF THE DECISION OF AN ISSUE OF LAW	422
Section	
1. Amending and Pleading Over	422
2. Appellate Review of Decisions of Issues of Law	470
3. Judgments upon Issues of Law as Res Judicata	491
BOOK II. DEFENSES IN POINT OF FACT.....	507
CHAPTER XII. NEGATIVE DEFENSES	507
Section	
1. The Traverse and Its Analogues.....	507
2. The Substantive Adequacy of Negative Defenses	548
3. The Procedural Consequences of Negative De- fenses	589
A. The Creation of Material Issues of Fact.....	589
B. The Creation of a Burden of Proof.....	596
C. The Creation of a Privilege of Disproof.....	613
CHAPTER XIII. AFFIRMATIVE DEFENSES	617
Section	
1. What is "New Matter"?.....	617
2. The Substantive Adequacy of the Facts Stated	636
3. The Procedural Regularity of the Statement of Facts	650
4. The Procedural Consequences of Affirmative Defenses	676
A. The Creation of a Burden of Pleading.....	676
B. The Creation of a Burden of Proof.....	698
C. The Creation of a Privilege of Disproof.....	705
D. The Transfer of the Right to Speak the First and Last Words.....	708

*

TABLE OF CASES

[Cases reproduced extensively and those digested or quoted, except in judicial opinions, have been included. Cases merely cited have been omitted. Principal cases are indicated by a bold-face page reference and note cases by a page reference in italics.]

Adair v. Bonninghausen, 305 Mich. 137, 9 N.W.2d 35 (1943)	533
Adams v. McMickle, 176 Or. 459, 158 P.2d 648 (1945)	484
Admiralty Commissioners v. S. S. Amerika [1917] A. C. 38 (1916)	274
Ahren v. Willis, 6 Fla. 359 (1855)	515
Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1275 (1940)	121
Alexandria, City of, v. Wilks, 18 So.2d 341 (La.App.1944)	115
Allegheny County v. Maryland Casualty Co., 132 F.2d 894 (C.C.A.3d 1943) ..	83
Allen v. Carolina Central Railway Company, 120 N.C. 548, 27 S.E. 76 (1897)	412
Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934)	215, 417
American Machine & Metals, Inc. v. De Bothezat Impeller Co., Inc., 166 F. 2d 535 (C.C.A.2d 1948)	128
American Wrecking Co. v. McMannus, 174 Wis. 300, 181 N.W. 235, modified 174 Wis. 300, 183 N.W. 250 (1921)	67
Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 650, 91 L.Ed. 573 (1947)	497, 501
Angers v. Sabatinelli, 239 Wis. 264, 1 N.W.2d 765 (1941)	431
Anson v. Kruse, 147 Neb. 989, 25 N.W.2d 896 (1947)	481
Armentrout v. Virginian Ry. Co., 72 F.Supp. 997 (D.C.W.Va.1947)	49
Armstrong v. Butte, Anaconda & Pacific Railway Company, 110 Mont. 133, 99 P.2d 223 (1940)	695
Armstrong v. Shell, 200 Miss. 135, 26 So.2d 344 (1946)	644
Arnstein v. Porter, 154 F.2d 464 (C.C.A.2d 1946)	578
Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943)	124
Asher v. Pitchford, 167 Or. 70, 115 P.2d 337 (1941)	448
Ayres v. Lucas, 116 Ind.App. 431, 63 N.E.2d 204 (1945)	668
Bach, Cory & Co. v. Montana Lumber & Produce Co., 15 Mont. 345 (1895) ..	530
Bache v. Bache, 33 Ariz. 45, 262 P. 11 (1927)	662
Baker v. Baker, 220 Iowa 1216, 264 N.W. 116, 103 A.L.R. 995 (1935)	134
Balle v. Moseley, 13 S.C. 439 (1885)	137
Barnes v. Quigley, 59 N.Y. 265 (1874)	357
Barthel v. Stamm, 145 F.2d 490 (C.C.A.5th 1944)	469
Bates v. Campbell, 25 Wis. 613 (1870)	32
Bauer v. Nenzil, 66 Cal.App.2d 1020, 152 P.2d 47 (1944)	402
Bell Grocery Co. v. Booth, 250 Ky. 21, 61 S.W.2d 879 (1933)	87
Benson v. Export Equipment Corporation, 49 N.M. 356, 164 P.2d 380 (1945) ..	386
Bereslavsky v. Caffey, 161 F.2d 499 (C.C.A.2d 1947)	320
Berger v. Steiner, 72 Cal.App.2d 208, 164 P.2d 559 (1945)	667
Berrien v. Pollitzer, 165 F.2d 21 (App.D.C.1947)	74
Best Foods, Inc. v. General Mills, Inc., 3 F.R.D. 275 (D.C.Del.1943)	251
Blackburn v. Beverly, 272 Ky. 346, 114 S.W.2d 98 (1938)	715
Blood v. Adams, 33 Vt. 52 (1860)	653

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and note cases by a page reference in italics.]

Board of Education v. Board of Education, 301 Ill.App. 228, 22 N.E.2d 400 (1939)	480
Board of Education v. Whisman, 56 S.D. 472, 229 N.W. 522 (1930)	679
Bolton v. Missouri Pacific Railway Co., 172 Mo. 92, 72 S.W. 530 (1903)	528
Booth v. Moody, 30 Or. 222, 46 P. 884 (1896)	399
Bowen v. Mewborn, 218 N.C. 423, 11 S.E.2d 372 (1940)	172
Braddock v. Pacific Woodmen Life Association, 89 Utah 75, 54 P.2d 1189 (1936)	714
Bradfield v. Board of Education of Pleasants County, 128 W.Va. 228, 36 S.E.2d 512 (1945)	417
Bradley v. Davis, 14 Me. 44 (1836)	294
Broomfield v. Checkoway, 310 Mass. 68, 38 N.E.2d 563 (1941)	25, 27
Bruce v. Odhams Press, Ltd., 52 T.L.R. 224 (Ct.App.1936)	255
Bruch v. Benedict, — Wyo. —, 165 P.2d 561	379
Bruheim v. Stratton, 145 Wis. 271, 129 N.W. 1092 (1911)	355
Buch v. Amory Manufacturing Co., 69 N.H. 257, 44 A. 809, 76 Am.St.Rep. 163 (1897)	154, 155
Bulova v. E. L. Barnett, Inc., 193 App.Div. 161, 183 N.Y.S. 495 (1st Dep't 1920)	655
Burdon v. Wood, 142 F.2d 303 (C.C.A.7th 1944)	699
Buskey v. New England Telephone & Telegraph Co., 91 N.H. 522, 23 A.2d 337 (1941)	183
Butler v. The Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716, 116 Am.St. Rep. 563, 11 L.R.A.,N.S., 920 (1906)	33
Butler v. Wolf Sussman, Inc., 221 Ind. 47, 46 N.E.2d 243, 145 A.L.R. 740 (1943)	19
Butt v. Herndon, 36 Kan. 370, 13 P. 580 (1887)	85
Button v. Pennsylvania R. R., 115 Ind.App. 210, 57 N.E.2d 444 (1944)	58
Byk v. Weber, 186 Misc. 456, 60 N.Y.S.2d 426 (1946)	669
 Cabell v. Cottage Grove, 170 Or. 256, 130 P.2d 1013 (1942)	174
California Apparel Creators v. Wieder of California, 162 F.2d 894 (C.C.A. 2d 1947)	588
Campbell v. Seaman, 63 N.Y. 568 (1876)	69
Carey v. Davis, 190 Iowa 720, 180 N.W. 889, 12 A.L.R. 904 (1921)	156
Carothers v. Board of Education of the City of Florence, 153 Kan. 126, 109 P.2d 63 (1941)	471
Caruso v. Brown, 142 Ky. 76, 133 S.W. 948 (1911)	659
Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945)	477
Cella v. Roth, 113 N.J.L. 458, 174 A. 703 (1934)	605, 698
Charlotte Barber Supply Co. v. Branham, 184 S.C. 184, 191 S.E. 891 (1937)	23
Chealey v. Purdy, 54 Mont. 489, 171 P. 926 (1918)	616
Chesapeake & Ohio Railway Company v. Carmichael, 298 Ky. 769, 184 S. W.2d 91 (1944)	618
Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N.W. 640 (1896)	53
City of. See under name of city.	
Clark v. Chicago, Milwaukee & St. Paul Railway Co., 28 Minn. 69, 9 N.W. 75 (1881)	233
Cody v. Hovey, 216 N.C. 391, 5 S.E.2d 165 (1939)	475

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and
note cases by a page reference in italics.]

Cohen v. United States, 129 F.2d 733 (C.C.A.3d 1942)	378
Cole v. Chief of Police of Fall River, 312 Mass. 523, 45 N.E.2d 400 (1942).....	104
Cole v. Woodson, 32 Kan. 272, 4 P. 321 (1884)	670
Coles v. Soulsby, 21 Cal. 47 (1862)	614
Conover v. Knight, 84 Wis. 639, 54 N.W. 1002 (1893)	256
Continental, etc., v. Shober, Jr., 130 F.2d 631 (C.C.A.3d 1942)	254
Coral Gables, Inc., v. Palmetto Brick Co., 183 S.C. 478, 191 S.E. 337 (1937)....	459
Cottrell v. Gerson, 371 Ill. 174, 20 N.E.2d 74 (1939)	487
County of. See under name of county.	
Cramer v. Aiken, 68 F.2d 761, 63 App.D.C. 16 (1934)	531, 532
Crawford v. Crawford, 222 Ky. 708, 2 S.W.2d 401 (1928)	405
Culp v. State, 109 Okl. 6, 234 P. 730 (1925)	483
Curtis Funeral Home v. Smith Lumber Co., 114 Vt. 150, 40 A.2d 531 (1945)....	409
Cussell v. Cochran, 114 Ind.App. 115, 50 N.E.2d 668 (1943)	406
Dacus v. Burns, 206 Ark. 810, 177 S.W.2d 748 (1944)	402
Daily v. Parker, 152 F.2d 174, 162 A.L.R. 819 (C.C.A.7th 1945)	172
Darrow v. Fleischner, 117 Conn. 518, 169 A. 197 (1933)	609
Davis v. State, 183 Md. 385, 37 A.2d 880 (1944)	119
Dean v. Atkinson, 201 Iowa 818, 208 N.W. 301 (1926)	551
Derby v. Gallup, 5 Minn. 119 (1860)	655
Desautel v. North Dakota Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942)	226
Devault v. Truman, 354 Mo. 1193, 194 S.W.2d 29 (1946)	242
Devoe v. Dusey, 205 Iowa 1262, 217 N.W. 625 (1928)	42
Dioguardi v. Durning, 139 F.2d 774 (C.C.A.2d 1944)	244
Ditmars v. Grand Stores, Inc., 134 N.J.L. 570, 49 A.2d 286 (1946)	445
Dominelli v. Markowski, 2 Harr. 595, 128 A. 527 (Del.1925)	408
Donald v. Davis, 49 N.M. 313, 163 P.2d 270 (1945)	640
Duby v. Hicks, 105 Or. 27, 209 P. 156 (1922)	401
Duke v. Crippled Children's Commission, Inc., 214 N.C. 570, 199 S.E. 918 (1938)	193, 414
Duke of Somerset v. Cookson, 3 Peere Williams 390 (Court of Chancery 1735)	26
Duncan v. Deming Investment Co., 54 Okl. 680, 154 P. 651 (1916)	501
Dunklin v. Watkins, 202 Ark. 602, 151 S.W.2d 978 (1941)	481
Dramis v. Dunbar, 280 Mich. 300, 273 N.W. 576 (1937)	688
Dwan v. Massarene, 199 App.Div. 872, 192 N.Y.S. 577 (1st Dep't 1922)	571
Dwinnell v. Acacia Mutual Life Insurance Co., 155 Kan. 464, 126 P.2d 221 (1942)	471
Edmands v. Olson, 64 R.I. 39, 9 A.2d 860 (1939)	287
Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 S.Ct. 771, 39 L.Ed. 913 (1895)	353
Ellinwood v. Bennion, 73 Utah 563, 276 P. 159 (1929)	80
Elston v. Wilborn, 208 Ark. 377, 186 S.W.2d 662 (1945)	158
Emersonian Apartments v. Taylor, 132 Md. 209, 103 A. 423 (1918)	475, 476
Emory v. Hazard Powder Company, 22 S.C. 476 (1885)	132
Engle v. Aetna Life Insurance Company, 139 F.2d 469 (C.C.A.2d 1943)	573
Evergreens v. Nunan, 141 F.2d 927 (C.C.A.2d 1944)	210

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and note cases by a page reference in *italics*.]

Farmers Bank of Trenton v. Ray & Son, 148 S.W.2d 120 (Mo.App.1941)	714
Feigenspon v. Penn, 350 Mo. 821, 168 S.W.2d 1074 (1943)	401
Ferris, In re Estate of, 234 Iowa 960, 14 N.W.2d 889 (1944)	383
First National Bank v. Ford, 30 Wyo. 110, 216 P. 691 (1923)	626
Fisher v. Goodman, 205 Wis. 286, 237 N.W. 93 (1931)	69
Fitzjarrell v. Boyd, 123 Md. 497, 91 A. 547 (1914)	98
Flaherty v. Wunsch, 28 N.Y.S.2d 178 (Sup.Ct.1941)	714
Ford v. Inhabitants of Town of Whitefield, 137 Me. 125, 15 A.2d 857 (1940)	594
French v. Jeffries, 149 F.2d 555 (C.C.A.7th 1945)	94
Funkhauser Equipment Co. v. Carroll, 161 Kan. 428, 168 P.2d 918 (1946)	484
F. W. Woolworth Co. v. Sunlight Chemical Corporation, 63 R.I. 384, 9 A.2d 8 (1939)	303
Galbraith v. Daily, 37 Misc. 156, 74 N.Y.S. 837 (Sup.Ct.1902)	551
George v. Jensen, 49 N.M. 410, 165 P.2d 129 (1946)	405
Gerber v. Schutte Investment Company, 354 Mo. 1246, 194 S.W.2d 25 (1946)	239
Gerstel v. William Curry's Sons Co., 155 Fa. 471, 20 So.2d 802 (1945)	379
Goddard v. Security Title Insurance & Guarantee Company, 14 Cal.2d 47, 92 P.2d 804 (1939)	491
Goodwine v. Cadwallader, 158 Ind. 202, 61 N.E. 939 (1901)	401
Gotheiner v. Lenihan, 20 N.J.Misc. 119, 25 A.2d 430 (1942)	693
Goulet v. Asseler, 22 N.Y. 225 (1860)	337
Graham v. Street, 109 Utah 460, 166 P.2d 524 (1946)	443
Granite State Bank v. Otis, 53 Me. 133 (1865)	665
Greeve v. Patik Coal Co., 232 Iowa 803, 5 N.W.2d 184 (1942)	415
Greiner v. Hicks, 231 Iowa 141, 300 N.W. 727 (1941)	654
Griffin v. Griffin, 183 Va. 443, 32 S.E.2d 700 (1945)	505
Griswold v. Boston & Marine Railroad, 183 Mass. 434, 67 N.E. 354 (1903)	153
Hadden v. Fuqua, 194 Ga. 621, 22 S.E.2d 377 (1942)	497
Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854)	38
Hall v. Woodward, 30 S.C. 564, 9 S.E. 684 (1889)	460
Halligan v. Chicago & Rock Island Railroad Co., 15 Ill. 558 (1854)	293
Halloran v. Hackmann, 160 S.W.2d 769 (Mo.Sup.1942)	381
Hamer v. Pennell, 86 F.2d 227 (1936)	645
Hammet v. Vogue, Inc., 179 Tenn. 284, 165 S.W.2d 577 (1942)	516
Hardie v. Peterson, 86 Mont. 150, 282 P. 494 (1929)	343
Harmon v. James, 146 Kan. 205, 69 P.2d 690 (1937)	471
Harri v. Isaac, 111 Mont. 152, 107 P.2d 137 (1940)	349
Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932)	461
Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 P.2d 919 (1943)	438
Hartke v. Abbott, 119 Cal.App. 439, 6 P.2d 578 (1931)	486
Hart-Parr Company v. Keeth, 62 Wash. 464, 114 P. 169 (1911)	663
Hassett v. Curtis, 20 Neb. 162, 29 N.W. 295 (1886)	603
Havens v. Hartford & New Haven Railroad Company, 28 Conn. 69 (1895)	363
Havens v. Irvine, 61 Wyo. 309, 157 P.2d 570 (1945)	595
Hayes v. Town of Cedar Grove, 126 W.Va. 828, 37 S.E.2d 450 (1946)	432
Hickey v. Breen, 40 Mont. 368, 106 P. 881 (1910)	605
Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)	250

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and note cases by a page reference in italics.]

Hill v. Smith, 27 Cal. 476 (1865)	508
Hill v. Walsh, 6 S.D. 421, 61 N.W. 440 (1894)	550
Hoard v. Gilbert, 205 Wis. 557, 238 N.W. 371 (1931)	224, 417
Hooper v. Wm. P. Laytham & Sons, Inc., 125 N.J.Eq. 454, 6 A.2d 204 (1939)	257
Hutchings v. Zumbrunn, 86 Okl. 226, 208 P. 398 (1922)	497
Hutchinson v. Sangster, 4 Greene 340 (1854)	636
 Idaho State Merchants' Protective Association v. Roche, 53 Idaho 115, 22 P.2d 136 (1933)	635
Ison v. Ison, 272 Ky. 836, 115 S.W.2d 330 (1938)	531
 Jacobson v. Mutual Benefit Health & Accident Association, 73 N.D. 108, 11 N.W.2d 442 (1943)	179
Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335 (1941)	143
Jensen v. Jensen, 20 Wash.2d 380, 147 P.2d 512 (1944)	403
Johnson v. Harris, 187 Okl. 239, 102 P.2d 940 (1940)	180
Johnson v. Moore, 109 Vt. 282, 196 A. 246 (1938)	713
Jones v. Jones, 136 Me. 238, 8 A.2d 141 (1939)	84
Jones v. McGonigle, 327 Mo. 457, 37 S.W.2d 892, 74 A.L.R. 550 (1931)	423
J. R. Watkins Co. v. Chapman, 197 Okl. 466, 172 P.2d 768 (1946)	404
J. R. Watkins Co. v. Ellington, 70 Ga.App. 722, 29 S.E.2d 300 (1944)	659
 Kaepler, In re, 7 N.D. 307, 75 N.W. 253 (1898)	103
Kalmanash v. Smith, 291 N.Y. 142, 51 N.E.2d 681 (1943)	215
Kappa Frocks, Inc., v. Alan Fabrics Corporation, 263 App.Div. 326, 32 N. Y.S.2d 985 (1942)	716
Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315, 1 A.L.R. 439 (1918)	145
Kejikian v. Star Brewing Co., 303 Mass. 53, 20 N.E.2d 465 (1939)	424, 485
Kelley v. Kelley, 74 Ohio App. 225, 57 N.E.2d 791 (1944)	237, 417
Kelley, Glover & Yale, Inc. v. Globe Indemnity Co., 70 N.E.2d 639 (Ind. App.1947)	482
Kellogg v. Freeland, 195 N.Y.S. 912 (Sup.Ct.1922)	532
Kenlee Corporation v. Isolantite, Inc., 137 N.J.Eq. 459, 45 A.2d 500 (1946)	269
Kentucky Home Mutual Life Insurance Co. v. Watts, 298 Ky. 471, 183 S. W.2d 499 (1944)	451
Kentucky Home Mutual Life Insurance Co. v. Watts, 304 Ky. 308, 200 S. W.2d 732 (1947)	691
Kern v. United Railways Company of St. Louis, 214 Mo.App. 232, 259 S. W. 821 (1924)	393
Kimber v. Gas Light & Coke Company [1918] 1 K.B. 439 (Ct.App.1918)	155
King v. Columbian Carbon Co., 152 F.2d 636 (C.C.A.5th 1945)	74
Kirk v. Welch, 212 Minn. 300, 3 N.W.2d 426 (1942)	569
Klausner v. Reeves, 226 Wis. 305, 276 N.W. 356 (1937)	139
Klitzke v. Herm, 242 Wis. 456, 8 N.W.2d 400 (1943)	541
Knapp v. Walker, 73 Conn. 459, 47 A. 655 (1900)	359
Knight v. Emmons Brothers Company, 181 App.Div. 751, 168 N.Y.S. 803 (1st Dep't 1918)	143
Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432 (1945)	195, 414

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and
note cases by a page reference in *italics*.]

Krauss v. Greenberg, 137 F.2d 569 (C.C.A.3d 1943)	42
Kullgren v. Navy Gas & Supply Co., 112 Colo. 331, 149 P.2d 653 (1944)	568
Lafayette and Indianapolis Railroad Co. v. Ehman, 30 Ind. 83 (1868)	604
Lamarand v. National Life & Accident Insurance Co., 58 Ohio App. 415, 16 N.E.2d 701 (1937)	715
Lamphear v. Buckingham, 33 Conn. 237 (1866)	366
Lane County v. Bristow, 179 Or. 653, 173 P.2d 954 (1946)	487
Langenberg v. City of St. Louis, 355 Mo. 634, 197 S.W.2d 621 (1946)	244
La Plante v. Implement Dealers Mutual Fire Insurance Co., 73 N.D. 159, 12 N.W.2d 630 (1944)	547
Lasko v. Meier, 394 Ill. 71, 67 N.E.2d 162 (1946)	393
Laughlin v. Garnett, 138 F.2d 931, 78 App.D.C. 194 (1943)	432
Ledbetter v. Ledbetter, 88 Mo. 60 (1885)	654
Lessans v. Lessans, 184 Md. 549, 42 A.2d 132 (1945)	475
Levy v. Massachusetts Accident Co., 124 N.J.Eq. 420, 2 A.2d 341 (1938)	535
Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation, 154 F. 2d 814 (C.C.A.2d 1946)	247
Lisbon v. Lyman, 49 N.H. 553 (1870)	626
Lisle v. Rhea, 9 Mo. 172 (1842)	87
Lord v. Veazie, 8 How. 251, 12 L.Ed. 1067 (U.S.1850)	101
Lubliner v. Ruge, 21 Wash.2d 881, 153 P.2d 694 (1944)	211
Lully v. National Surety Co., 106 N.J.L. 81, 148 A. 762 (1930)	480
Luotto v. Field, 294 N.Y. 460, 63 N.E.2d 58 (1945)	136
Lupton v. Day, 211 N.C. 443, 190 S.E. 722 (1937)	600
Lyons v. Liberty National Bank, 65 F.2d 837 (App.D.C.1933)	143
McAlpine v. Fidelity & Casualty Company of New York, 134 Minn. 192, 158 N.W. 967 (1916)	666
McCaughy v. Schuette, 117 Cal. 223, 46 P. 665 (1897)	233
McDonough v. Southern Oregon Mining Co., 177 Or. 136, 159 P.2d 829 (1945)	398
McKay v. Darling, 65 Vt. 639 (1893)	301
McNamara & Duncan v. Caban, 21 Neb. 589, 33 N.W. 259 (1887)	88
Makusevich v. Gotta, 107 Conn. 207, 139 A. 780 (1928)	360
Malin v. Southern Pacific Company, 62 Ariz. 126, 154 P.2d 790 (1944)	216
Manko v. City of Buffalo, 294 N.Y. 109, 60 N.E.2d 828 (1945)	134
Marie v. Garrison, 83 N.Y. 14, 23 (1880)	413
Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934)	538, 552
Marshall v. Wittig, 210 Wis. 510, 238 N.W. 390 (1931)	234
Martin v. Smith, 214 Minn. 9, 7 N.W.2d 481 (1942)	333
Matson v. Tip Top Grocery Co., Inc., 151 Fla. 247, 9 So.2d 366 (1942)	425
Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So.2d 780 (1942)	54
Mawson v. Vess Beverage Co., 173 S.W.2d 606 (Mo.App.1943)	328
Maxham v. Day, 16 Gray 213, 77 Am.Dec. 409 (Mass.1860)	24
Menke v. Rovin, 352 Mo. 826, 180 S.W.2d 24 (1944)	138
Miller v. General Motors Corporation, 279 Mich. 240, 271 N.W. 746 (1937)	532
Mining Securities Co. v. Wall, 99 Mont. 596, 45 P.2d 302	233, 234, 235
Mitchell v. City of Portland, 159 Or. 91, 78 P.2d 582 (1938)	635

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and note cases by a page reference in italics.]

Mitchell v. Dunmore Realty Co., 135 App.Div. 771, 120 N.Y.S. 771 (1st Dep't 1909) affirmed 199 N.Y. 530, 92 N.E. 1092	474
Mitchell v. Swanwood Coal Company, 182 Iowa 1002, 166 N.W. 391 (1918)	140, 618
Moen v. Thompson, 186 Misc. 647, 61 N.Y.S.2d 257 (1946)	312
Morgan Munitions Co. v. The Studebaker Corporation of America, 226 N.Y. 94, 123 N.E. 146 (1919)	529
Morgan & Rogers v. Hawkeye Insurance Co., 37 Iowa 359 (1873)	564
Morrow's Will, In re, 41 N.M. 723, 73 P.2d 1360 (1937)	235
Mulry v. Mohawk Valley Insurance Company, 5 Gray 541 (1856)	631
Murphy v. National City Bank of New York, 203 App.Div. 571, 196 N.Y.S. 589 (1st Dep't 1922)	191
Mutual Benefit Health & Accident Association v. Ferrell, 42 Ariz. 477, 27 P.2d 519 (1933)	666
Nassaney v. Culler, 224 N.C. 323, 30 S.E.2d 226 (1944)	447
National Surety Corporation v. Clement, 133 N.J.L. 22, 42 A.2d 387 (1945)	564
Needham v. Gilaspy, 49 Ind. 245, 247 (1874)	88
Neefus v. Neefus, 209 Minn. 495, 296 N.W. 579 (1941)	648
Nesbitt v. DeMasters, 44 Idaho 143, 255 P. 408 (1927)	508
New Haven Water Co. v. City of New Haven, 131 Conn. 456, 40 A.2d 763 (1944)	120
Newman v. Zinn, 164 F.2d 558 (C.C.A.3d 1947)	467
Newport Savings Bank v. Manley, 114 Vt. 347, 45 A.2d 199 (1946)	644
Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943)	481
O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 P. 399 (1906)	532
O'Donnell v. Lesselyoung, 150 Minn. 318, 185 N.W. 289 (1921)	569
O'Keefe v. Young & Rubicam, Inc., 257 App.Div. 141, 12 N.Y.S.2d 31 (1st Dep't 1939)	686
Oliver v. Coffman, 112 Ind.App. 507, 45 N.E.2d 351 (1942)	236
Page v. North Carolina Mutual Life Insurance Co., 207 S.C. 277, 35 S.E. 2d 716 (1945)	428
Paramount Publix Corporation v. Boucher, 93 Mont. 340, 19 P.2d 223 (1933)	410
Parker v. Pullman & Co., 36 App.Div. 208, 53 N.Y.S. 839 (2d Dept. 1899)	139
Parrish v. Atlantic Coast Line Railroad Company, 221 N.C. 292, 20 S.E. 2d 299 (1942)	205, 414
Patrick v. Holliday, 200 Ga. 259, 36 S.E.2d 769 (1946)	602
Patten v. Dennis, 134 F.2d 137 (C.C.A.9th 1943)	246
Pavlis v. Atlas-Imperial Diesel Engine Co., 121 Fla. 185, 163 So. 515 (1935)	22
P. B. & W. R. R. Co. v. Gatta, 27 Del. 38, 85 A. 721 (1913)	268, 303
Penton v. Canning, 57 Wyo. 390, 118 P.2d 1002 (1941)	174
People v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944)	247, 417
People v. McCumber, 18 N.Y. 315, 72 Am.Dec. 515 (1858)	560, 561
People v. Severson, 113 Ill.App. 496 (1904)	87
Peoples Natural Gas Co. v. Federal Power Commission, 127 F.2d 153, 75 App.D.C. 235 (1942)	673

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and
note cases by a page reference in italics.]

Perkins v. Brock, 80 Cal. 320, 22 P. 194 (1889)	527
Phenix Ins. Co. v. Bachelder, 39 Neb. 95, 57 N.W. 996	557
Pierce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943)	120
Piercy v. Sabin, 10 Cal. 22 (1858)	622
Pineville, City of, v. Asher, 287 Ky. 503, 154 S.W.2d 545 (1941)	689
Pioneer Reserve Life Insurance Co. v. Dunavant, 182 Okl. 58, 76 P.2d 1044 (1938)	437
Polemis and Furness, Withy & Co., In re, [1921] 3 K.B. 560 (1921)	50
Poole v. Poole, 221 Iowa 1073, 265 N.W. 653 (1936)	674
Porter v. Karavas, 157 F.2d 984 (C.C.A.10th 1946)	248
Price v. Wilson, 32 A.2d 109 (D.C.Mun.App.1943)	102
Prisant v. Feingold, 169 Ga. 864, 151 S.E. 799 (1930)	635
Provo City v. Claudin, 91 Utah 60, 63 P.2d 570 (1936)	428
Prudential Ins. Co. v. Moore, 197 Ind. 50, 149 N.E. 718 (1925)	210
Pullen v. Seaboard Trading Co., 165 App.Div. 117, 150 N.Y.S. 719 (1st Dep't 1914)	527
Quinlivan v. Brown Oil Co., 96 Mont. 147, 29 P.2d 374 (1934)	634
Railroad v. Conk, 58 Tenn. 575 (1872)	516
Rannard v. Lockheed Aircraft Corporation, 150 P.2d 255 (Cal.App.1944)	231
Rannard v. Lockheed Aircraft Corporation, 26 Cal.2d 149, 157 P.2d 1 (1945)	227
Reconstruction Finance Corporation v. Lucius, 320 Ill.App. 57, 49 N.E.2d 852 (1943)	220
Revis v. The City of Asheville, 207 N.C. 237, 176 S.E. 738 (1934)	209
Reynolds v. Van Culin, 36 Haw. 556 (1943)	98
Reynolds v. Vroom, 130 Conn. 512, 36 A.2d 22 (1944)	103
Richter v. Adamms, 19 Cal.App.2d 572, 66 P.2d 226 (1937)	635
Ringstad v. Grannis, 159 F.2d 289 (C.C.A.9th 1947)	599
Rivers v. Key, 189 Ga. 832, 7 S.E.2d 732 (1940)	486
R. J. Bearings Corporation v. Warr, 192 Okl. 133, 134 P.2d 355 (1943)	634
Rogers v. Duhart, 97 Cal. 500, 32 P. 570 (1893)	346
Ross v. Robinson, 174 Or. 25, 147 P.2d 204 (1944)	452
Ruckman v. Cudahy Packing Co., 230 Iowa 1144, 300 N.W. 320 (1941)	638
St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943)	106
Samuell v. Moore Mercantile Co., 62 Mont. 232, 204 P. 376 (1922)	340
Sandblast v. Oregon Liquor Control Commission, 177 Or. 213, 161 P.2d 919 (1945)	478
Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1 (1944)	59
San Francisco, City and County of v. Boyd, 22 Cal.2d 685, 140 P.2d 666 (1943)	101
Sartin v. Barlow, 196 Miss. 159, 16 So.2d 372 (1944)	107
Savings & Loan Insurance Corporation v. Strangers' Rest Baptist Church, 156 Kan. 205, 131 P.2d 654 (1943)	696
Schell v. City of Walla Walla, 44 Wash. 43, 86 P. 1114 (1906)	551
Schichowski v. Hoffmann, 261 N.Y. 389, 185 N.E. 676 (1933)	156
Schreiber, Matter of, 170 App.Div. 543, 156 N.Y.S. 545 (1st Dep't 1915)	539
Scott v. Shepherd, 2 Wm. Blackstone 892 (C.P. 1773)	292

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and
note cases by a page reference in italics.]

Seattle National Bank v. Carter, 13 Wash. 281, 43 P. 331, 48 L.R.A. 177 (1895)	664
Seufert v. Commercial Travelers Mutual Accident Association of America, 263 N.Y. 496, 189 N.E. 563 (1934)	698
Shake v. Board of Commissioners of Sullivan County, 210 Ind. 61, 1 N.E. 2d 132 (1936)	220
Sharp v. Cox, 158 Kan. 253, 146 P.2d 410 (1944)	213, 417
Sharrod v. London & North Western Railway Co., 4 Ex. 580 (1849)	289
Sheehy v. Roman Catholic Archbishop of San Francisco, 49 Cal.App.2d 537, 122 P.2d 60 (1942)	486
Sherburne Mercantile Co. v. Bonds, 115 Mont. 464, 145 P.2d 827 (1944)	691
Sherrill v. Stewart, 197 Miss. 880, 21 So.2d 11 (1945)	566
Sidis v. F. R. Publishing Corporation, 113 F.2d 806, 138 A.L.R. 15 (C.C.A. 2d 1940)	156
Slater v. Fehlberg, 24 R.I. 574, 54 A. 383 (1903)	302
Smith v. Baltimore & Ohio Railroad Co., 168 Md. 89, 176 A. 642 (1935)	476
Smith v. Barksdale, 199 Ga. 723, 35 S.E.2d 149 (1945)	484
Smith v. Summerfeld, 108 N.C. 284, 12 S.E. 997 (1891)	375
Southern Ry. Co. v. King, 217 U.S. 524, 30 S.Ct. 594, 54 L.Ed. 868 (1910)	216
Southern Railway Co. v. State, 116 Ga. 276, 42 S.E. 508 (1902)	112
Sovereign Bank of Canada v. Stanley, 176 F. 743 (C.C.S.D.N.Y.1910)	527
Sparks v. England, 113 F.2d 579 (C.C.A.8th 1940)	250
Stamford Dock & Realty Corporation v. City of Stamford, 124 Conn. 341, 200 A. 343 (1938)	485
State v. California Packing Corporation, 105 Utah 191, 145 P.2d 784 (1944)	498
State v. Dolley, 82 Kan. 533, 108 P. 846 (1910)	111
State v. Pope, 4 Wash.2d 394, 103 P.2d 1089, 129 A.L.R. 240 (1940)	25
State ex rel. Barron v. District Court, — Mont. —, 174 P.2d 809 (1946)	697
State ex rel. Cheeks v. Wirt, 203 Ind. 121, 177 N.E. 441 (1931)	528
State ex rel. Reser v. District Court, 53 Mont. 235, 163 P. 1149 (1917)	82
State Industrial Commission, Matter of, 224 N.Y. 13, 119 N.E. 1027 (1918)	108
Staten Island Midland Railroad Co. v. Hinchcliffe, 170 N.Y. 473, 63 N.E. 545 (1902)	529
Steele v. Steele, 65 F.Supp. 329 (D.C.D.C.1946)	146, 150
Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237 (1918)	488
Stinson v. Edgemoor Ironworks, 53 F.Supp. 864 (D.C.Del.1944)	296
Stivers v. Baker, 87 Ky. 508, 9 S.W. 491 (1888)	226, 417
Stoddard v. Onondaga Annual Conference, 12 Darb. 573 (N.Y.Sup.Ct. 1851)	624
Stolpher v. Bowen Motor Coaches, Inc., 190 S.W.2d 376 (Tex.Civ.App. 1945)	717
Strode's Ex'x v. Strode, 243 Ky. 367, 48 S.W.2d 543 (1932)	424
Swords v. Occident Elevator Co., 72 Mont. 189, 232 P. 189 (1924)	613
Symington v. Haxton, 195 App.Div. 85, 186 N.Y.S. 397 (1921)	191, 414
Taggart v. George B. Brooker & Co., 3 Terry 386, 35 A.2d 499 (Del.1943)	215
Terner v. Gleckstein & Terner, Inc., 283 N.Y. 299, 28 N.E.2d 846	316
Thayer v. Brewer, 15 Pick. 217 (Mass.1834)	513
Thayer v. Gile, 42 Hun. 268 (N.Y.Sup.Ct.App.Div., 1886)	231, 232
Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349 (1945)	179

TABLE OF CASES

[Principal cases are indicated by a bold-face page reference and
note cases by a page reference in italics.]

Thompson-Starret Co. v. Chicago, etc., D.C., 3 F.R.D. 68 (D.C.N.D.Ill.1942) ..	254
Tighe v. Interstate Transit Lines, 130 Neb. 5, 263 N.W. 483 (1935) ..	665
Tiller v. Atlantic Coast Line Railroad Co., 323 U.S. 574, 65 S.Ct. 421, 89 L. Ed. 465 (1945) ..	468
Truelove v. Durham & Southern Railway Co., 222 N.C. 704, 24 S.E.2d 537 (1943) ..	208
Tryon, Town of, v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942) ..	124
Turner v. Little, 70 Ga.App. 567, 28 S.E.2d 871 (1944) ..	705
Uggle v. Brokaw, 77 App.Div. 310, 79 N.Y.S. 244 (1st Dep't 1902) ..	655
Union Pacific Railway Company v. Cappier, 66 Kan. 649, 72 P. 281, 69 L. R.A. 513 (1903) ..	151
United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943) ..	99
United States v. Payne, 73 F.2d 900 (C.C.A.9th 1934) ..	401
United States v. 243.22 Acres of Land, 129 F.2d 678 (C.C.A.2d 1942) ..	477
United States Fidelity & Guaranty Co. v. Pierson, 89 F.2d 602 (C.C.A.8th 1937) ..	675
Universal Credit Co. v. Antonsen, 374 Ill. 194, 29 N.E.2d 96 (1940) ..	24
Universal Oil Products Company v. Vickers Petroleum Company of Dela- ware, 41 Del. 143, 16 A.2d 795 (1940) ..	672
Virginian Ry. Co. v. Armentrout, 158 F.2d 358 (C.C.A.4th 1946) ..	47
Vondera v. Chapman, 352 Mo. 1034, 180 S.W.2d 704 (1944) ..	691
Waddell v. Woods, 160 Kan. 481, 163 P.2d 348 (1945) ..	458
Walker v. American Central Insurance Company, 143 N.Y. 167, 38 N.E. 106 (1894) ..	686
Walton Plow Co. v. Campbell, 35 Neb. 173, 52 N.W. 883 ..	557
Watson v. Lee County, 224 N.C. 508, 31 S.E.2d 535 (1944) ..	391
Wayland v. Tysen, 45 N.Y. 281 (1871) ..	560
Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316 (C.C.A.3d 1944) ..	589
Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358 (1942) ..	432
Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888) ..	66
Whetsell v. Sovereign Camp, W.O.W., 188 S.C. 106, 198 S.E. 153 (1938) ..	508
White v. Toombs, 162 Kan. 585, 178 P.2d 206 (1947) ..	412
Wilbridge v. Case, 2 Ind. 36 (1850) ..	594
Williams v. Hayes, 5 How.Pr. 470 (N.Y.Sup.Ct.1851) ..	210
Williams v. Jefferson Standard Life Insurance Company, 181 S.C. 344, 187 S.E. 540 (1936) ..	682, 708
Williams v. Metropolitan Life Insurance Co., 202 S.C. 384, 25 S.E.2d 243 (1943) ..	704
Winans v. Attorney-General, [1904] A.C. 287 (1904) ..	610
Woost v. Herberger, 204 Minn. 192, 283 N.W. 121 (1938) ..	657, 661
Wyman v. McCarthy, 93 Colo. 340, 26 P.2d 245 (1933) ..	624
Yates v. Box, 194 Miss. 374, 11 So.2d 802 (1943) ..	482
Zabriskie v. Smith, 13 N.Y. 330 ..	413
Zalkind v. Scheinman, 139 F.2d 895 (C.C.A.2d 1943) ..	473
Zebold v. Hurst, 65 Okl. 248, 166 P. 99 (1917) ..	674

TABLE OF STATUTES

[Statutes reproduced, quoted or digested have been included. Those merely cited have been omitted. The reproduction or quotation of the statutory language is indicated by a page reference in *italics*.]

ARKANSAS

Statutes 1937	
§ 1415	364

CALIFORNIA

Code of Civil Procedure	
§ 430, subds. 1-10	411
§ 437	522
§ 443	549
§ 444, subds. 1-5	549
§ 473	447

ENGLAND

Rules of the Supreme Court 1883	
Order I, Rule 1	324
Order XXV, Rules 1-3	372
Order XIX, Rule 4	325

GEORGIA

Code 1933	
§ 6-701	484
§ 81-304	409
§ 81-310	659

IDAHO

Laws 1943	
§ 5-617	676
§ 5-812	677

ILLINOIS

Civil Practice Act	
§ 1	325
§ 31	325
§ 33	325
§ 33, subds. 1-3	651, 652
§ 40, subds. 1-4	518, 519
§ 41	519
§ 43, subds. 1-3	652
§ 43, subd. 4	617
§ 85	518

INDIANA

Rules of Procedure and Practice	
Rule 2-3	483
Burns' Annotated Statutes	
§ 3-2701	20

IOWA

Acts 50 General Assembly Iowa	
p. 291	196
Rules of Civil Procedure	
Rule 72	669
Rule 86	489
Rule 331, subds. (a), (b)	490
Rule 332, subds. (a), (b)	490

KANSAS

General Statutes 1935	
§ 60-3302	470
§ 60-3303	470
§ 60-741	214

KENTUCKY

Code of Civil Practice	
§ 113(4)	663
§ 133	424
§ 317, subd. 6	711
§ 525	711
§ 526	711

MARYLAND

Code General Laws	
art. 5, § 30	475

MASSACHUSETTS

General Laws (Ter.Ed.)	
c. 214, § 3(1)	27
c. 214, § 9A	62
c. 231, § 1	324
c. 231, § 90	659
c. 231, § 96	485
c. 231, § 125	485

MICHIGAN

Court Rules	
Rule 17, § 6	669
Rule 23, § 2	520

MINNESOTA

Statutes 1945	
§ 544.08	548
§ 544.10	562
Statutes Annotated 1935	
§ 605.09, subds. 1-5	472

TABLE OF STATUTES

[The reproduction or quotations of statutory language is indicated by a page reference in *italics*.]

MISSISSIPPI

Code 1942	
§ 1480	516
§ 1490	377
§ 1497	409
§ 2729	55

MISSOURI

Revised Statutes Annotated (Cum.Supp.1946)	
§ 847.61, subds. 1-10	384
§ 847.101	239
§ 925	423

MONTANA

Revised Codes 1935	
§ 9158	678
§ 9160	678
§ 9161	679
§ 9189	425

NEBRASKA

Revised Statutes 1943	
§ 25-824	538, 558
§ 25-1107, subds. 1-7	710
§ 25-2224	555
§ 52-101	604

NEVADA

Compiled Laws	
§ 8598	364

NEW JERSEY

New Jersey Statutes Annotated	
§ 2-27-124	563
§ 2-27-125	564
Chancery Court Rules	
Rule 49	521
Rule 50	521
Rule 57	521
Rule 58	521
Rule 67	521
Supreme Court Rules	
Rule 40	373
Rule 41	373
Rule 42	373
Rule 80	567

NEW YORK

Civil Practice Act	
§ 8	324
§ 111	315

NEW YORK—Cont'd

Civil Practice Act—Cont'd	
§ 241	166, 324, 650
§ 242	617, 677
§ 243	191, 677
§ 244	422
§ 248	517
§ 254	136
§ 255, subds. 1-3	136
§ 255-a	517
§ 260	517
§ 261	617
§ 261, subds. 1, 2	517
§ 262	650
§ 266	677
§ 272	677
§ 274	677
§ 276	518
§ 277	370
§ 278	376
§ 278, subds. 1, 2	371
§ 279	371
§ 280	376
§ 283	424
§ 352	573
§ 434	461
§ 476	86
§ 479	136, 317
§ 495	81
§ 580	473
§ 608	473
§ 609	474
§ 609, subds. 3-5	473
§ 1172	312

Decedent Estate Law

§ 131	618
-------------	-----

Constitution 1846

Art. VI, § 3	309
--------------------	-----

Rules of Civil Practice

Rule 90	651
Rule 102	413
Rule 103	414, 562
Rule 104	562, 678
Rule 106	474
Rule 106, subds. 1-5	371
Rule 107, subds. 1-9	385
Rule 108	385
Rule 109, subds. 1-6	549
Rule 111	678
Rule 113, subds. 1-8	570
Rule 166, subds. 1, 2	461

Supreme Court Rules

Rule III(12)	376
--------------------	-----

TABLE OF STATUTES

[The reproduction or quotations of statutory language is indicated by a page reference in *italics*.]

NORTH CAROLINA

Consolidated Statutes	
§ 537	205
General Statutes	
§ 1-127, subds. 2-6	370
§ 1-127, subds. 1-6	369, 370
§ 1-128	375
§ 1-133	370
§ 1-134	370
§ 1-153	413
§ 1-277	475

NORTH DAKOTA

Revised Code 1943	
§ 28-0735	423

OHIO

General Code	
§ 11979	238

OKLAHOMA

Statutes 1941	
Tit. 12, § 314	422
Tit. 12, § 315	422
Tit. 12, § 316	425
Tit. 12, § 952	483

OREGON

Compiled Laws 1940	
§ 1-1006	447
§ 10-801	478
§ 10-812	483

SOUTH CAROLINA

Code 1942	
§ 468	650
§ 493	424
§ 494	460

SOUTH DAKOTA

Revised Code	
§ 2357	680
§ 2372	680
§ 33.0701	481

TENNESSEE

Code 1934	
§ 8758	516
§ 8759	516
§ 8761	516
§ 8762	517
§ 8763	517
§ 8765	516
§ 8766	516
§ 8767	516

TEXAS

Rules of Civil Procedure	
Rule 45(b)	236
Rule 266	711
Rule 269(b, e)	712

UNITED STATES

Federal Rules of Civil Procedure	
Rule 1	325
Rule 2	326
Rule 7(a)	678
Rule 7(c)	374
Rule 8(a)	137
Rule 8(a, b)	326
Rule 8(b)	519
Rule 8(b, c)	618
Rule (b), (c) (1) (2), (f)	652
Rule 11	519
Rule 12(b, d)	374
Rule 12(e)	253, 255
Rule 12(e-h)	414, 415
Rule 15(a)	423
Rule 15(b, c)	466, 467
Rule 16(1-6)	540, 541
Rule 16(3-6)	541
Rule 56(a-g)	571, 572, 573
Rule 84	520

Appendix of Forms to Federal

Rules of Civil Procedure

Form 20	520
Judicial Code	
§ 128	476

United States Code Annotated

Title 28, § 41	97
Title 28, § 80	97
Title 28, § 225(a, b)	476
Title 28, § 349a	100
Title 28, § 401	99

Statutes at Large

50 Stat. 752	100
--------------------	-----

UTAH

Code 1943	
§ 20-2-2	500
§ 104-24-14, subds. 5, 6	711
§ 104-30-8	80

Constitution

Art. VIII, § 9	500
----------------------	-----

VIRGINIA

Code 1942	
§ 5786	146
§ 5787	146
§ 5790	146
§ 6118	232

TABLE OF STATUTES

[The reproduction or quotations of statutory language is indicated by a page reference in *italics*.]

VERMONT

Public Laws 1933

§ 1578 410

WASHINGTON

Revised Statutes

§ 276 548

§ 308-6 466

§ 714 25

Rules of Practice

Rule 6, subds. 1-4 466

WEST VIRGINIA

Code

§ 5591 420

WYOMING

Compiled Statutes 1945

§ 3-1706 423

TABLE OF ARTICLES, BOOKS, REPORTS AND OTHER PUBLICATIONS

[Items for which neither an author's name nor a title is given have been omitted. The reproduction or quotation of extracts is indicated by a page reference in italics.]

Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich.L. Rev. 392 (1941)	535
American Law Institute	
Restatement of Agency, § 7 (1933)	235
Restatement of Contracts, § 361 (e)	61, 65
Restatement of Torts, § 653, comment b (1938)	213
Restatement of Torts, § 946, comments a, b (1939)	25
Ames, Lectures on Legal History	298
Anderson, Declaratory Judgments	121
Negative Pregnant, 3 Idaho L.J. 245 (1933)	531
Appleman, Insurance Law and Practice	99
Arnold, Trial by Combat and the New Deal, 47 Harv.L.Rev. 913 (1934)	594
Atkinson, Pleading the Statute of Limitations, 36 Yale L.J. 914 (1927)	617
Black, Judgments	367
Blackstone, Commentaries	10, 14, 28, 557
Bliss, Code Pleading	170, 326
Blume, A Rational Theory for Joinder of Causes of Action and Defense, 26 Mich.L.Rev. 1 (1927)	659
The Scope of a Civil Action, 42 Mich.L.Rev. 257 (1943)	585
Bohlen, Studies in the Law of Torts	153, 156
The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. of Pa.L.Rev. 217 (1908)	156
Borchard, Declaratory Judgments	116, 120
Bordwell, The Resurgence of Equity, 1 U. of Chi.L.Rev. 741 (1934)	319
Carmody, Pleading and Practice in New York	256
Caskey & Young, The Bill of Particulars—A Brief for the Defendant, 27 Va.L.Rev. 472 (1941)	257
Chitty, Pleading	271, 366
Chitty, Pleading. Form of Special Demurrer to a Declaration *678 (2d Am.Ed. 1812)	408
Clark, Code Pleading	364, 370, 372, 381, 386, 392, 410, 442, 443, 524, 526, 529, 537, 538, 539, 620, 631, 655, 656, 657, 672, 690, 697
Code Pleading	59, 133, 134, 161, 255, 345, 376, 379, 422, 493, 522, 523, 525, 526, 532, 538, 539, 617, 618, 623, 634, 654, 659, 669, 671, 676, 677, 697
Handbook of the Law of Code Pleading	345
Simplified Pleading, 2 F.R.D. 456 (1943)	467
Simplified Pleading, 6 Fed. Rules Serv. 819	256
Simplified Pleading, 6 Fed. Rules Serv. 819	257
Simplified Pleading, 27 Iowa L.Rev. 276, n. 8	314

TABLE OF ARTICLES, BOOKS, ETC.

[The reproduction or quotation of extracts is indicated by a page reference in italics.]

Clark, Code Pleading—Cont'd	
Summary Judgments, 25 J.Am.Jud.Soc. 20 (1942)	578
The Bar and the Recent Reform of Federal Procedure, 25 A.B. A.J. 22 (1939)	256
Cleary, Res Judicata Reexamined, 57 Yale L.J. 339 (1948)	496
Cohen, Collection of Money Judgments in New York: Third Party Orders, 35 Col.L.Rev. 1167 (1935)	93
Collection of Money Judgments in New York: Supplementary Proceedings, 35 Col.L.Rev. 1007 (1935)	93
Collection of Money Judgments: Experimentation with Supplementary Proceedings, 36 Col.L.Rev. 1061 (1936)	93
Powers of the New York Court of Appeals	473
Commission on the Administration of Justice in New York State, Report 272	538
Commissioners, First Report on Courts of Common Law, 34, 79 ff (1829)	272, 324
First Report on Practice and Pleadings (1848)	308
Progress Report on Pleading and Practice, 14 (1847)	320, 323
Third Report on Courts of Common Law, 6 (1831)	321
Committee on the Judiciary of the Senate, Sen. Rep. on Public Bills, 73d Congress, 2d Sess., Vol. II, No. 1005, 2, 4-5	116, 117
Cooley, Torts	13
Documents of the New York Assembly, Report No. 202, 70th Session (1847)	323
Dowdall, Pleading "Material Facts", 77 Pa.L.Rev. 945 (1929)	192
Durfee, Cases on Equity	73
Emmerglick, A Century of the New Equity, 23 Tex.L.Rev. 244 (1945)	320
Evans, Problems in the Enforcement of Federal Judgments, 4 Mo.L.Rev. 19 (1939)	93
Fee, The Lost Horizon in Pleading under the Federal Rules of Civil Procedure, 48 Col.L.Rev. 491 (1948)	239
Finkelstein, The Plea of Property in a Stranger in Replevin, 23 Col.L. Rev. 652 (1923)	17
Freeman, Executions	88, 91
Judgments	81
Goebel, Development of Legal Institutions	262, 263
Hankin, Alternative and Hypothetical Pleading, 33 Yale L.J. 365 (1924)	671
Hepburn, Development of Code Pleading	284
Hitch, The Declaratory Judgment—A Necessary Addition to Georgia Procedure, 7 Ga.B.J. 132 (1944)	114
Holdsworth, A History of English Law	28, 281
Equity (Jubilee Number) 51 L.Q.Rev. 142 (1935)	319
Some Makers of English Law	319
The New Rules of Pleading of the Hilary Term, 1834, 1 Camb. L.J. 261 (1923)	515

TABLE OF ARTICLES, BOOKS, ETC.

[The reproduction or quotation of extracts is indicated by a page reference in italics.]

Holtzoff, Instruments of Discovery under Federal Rules of Civil Procedure, 41 Mich.L.Rev. 205 (1942).....	257, 575
Ilsen, Recent Cases and New Developments in Federal Practice and Procedure, 16 St. John's L.Rev. 1	576
Recent Developments in Federal Practice and Procedure, Federal Rules of Civil Procedure 343-349 (West rev. ed. 1947)	589
Judicial Council of the State of New York First Report, 47 (1935)	474
Seventh Annual Report, 42-43	539
Tenth Annual Report, 318 (1944)	372, 385, 563
Keigwin, Cases in Code Pleading	266, 284, 285, 311, 326, 345, 347, 361
Cases in Common Law Pleading	266, 286, 287, 349, 361, 416, 509, 510
Kerr, A Treatise on Injunctions (6th ed. by Patterson)	66
King, The Enforcement of Money Judgments in California, 11 So. Calif. L.Rev. 215 (1938)	93
Kohler, Philosophy of Law (Albrecht's trans.)	12
Krassa, Interaction of Common Law and Latin Law: Enforcement of Specific Performance in Louisiana and Quebec, 21 Can.B.Rev. 337 (1943)	65
Langdell, Equity Jurisdiction	13, 89
Loomis, The Effect of a Decision Sustaining a Demurrer to a Complaint, 9 Yale L.J. 387 (1900)	496
Lunn, Modernize the Process for Enforcement of Judgments, 22 A.B. A.J. 276 (1936)	93
McCormick, Damages	38, 42, 42, 43, 45, 47
McNair, This Polemis Business, 4 Camb.L.J. 125 (1931)	54
Maine, Ancient Law (New ed.)	277
Early Law and Custom	302
Maitland, Equity	64
Forms of Action at Common Law	18, 238, 261, 278
Lectures on Equity	319
Markby, Elements of Law	115
Martin, Civil Procedure at Common Law	28, 80, 267, 270, 289, 291, 295, 367, 368, 378, 509, 510
Michael & Adler, The Nature of Judicial Proof	594
The Trial of an Issue of Fact: I, 34 Col.L.Rev. 1224 (1934).....	166, 186, 199, 363, 507, 526, 529, 536, 596, 698
Millar, Civil Pleading in Scotland, 30 Mich.L.Rev. 741 (1932)	345
Pleading under the Illinois Civil Practice Act, 28 Ill.L.Rev. 460 (1933)	659
The Old Regime and the New in Civil Procedure, 14 N.Y.U.L.Q.Rev. 197 (1937)	344, 539, 540
Moore, Federal Practice	251, 524
Morgan & Maguire, Cases and Materials on Evidence	617

TABLE OF ARTICLES, BOOKS, ETC.

[The reproduction or quotation of extracts is indicated by a page reference in italics.]

Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Col.L.Rev. 335 (1924)	47
Pekelis, Legal Techniques and Political Ideologies, 4 Mich.L.Rev. 665 (1943)	320
Philbrick, Seisin and Possession as the Basis of Legal Title, 24 Iowa L.Rev. 268 (1939)	32
Pike, Objections to Pleadings under the New Federal Rules of Civil Procedure, 47 Yale L.J. 50 (1937)	255
Some Current Trends in the Construction of the Federal Rules, 9 Geo.Wash.L.Rev. 26	576
The New Federal Deposition-Discovery Procedure and the Rules of Evidence, 34 Ill.L.Rev. 1	251, 576
Pike & Willis, Federal Discovery in Operation, 7 U. of Chi.L.Rev. 297	576
The New Federal Deposition-Discovery Procedure (1938) 38 Col.L. Rev. 1179	251, 260, 576
Pomeroy, Code Remedies	144, 522, 524, 529, 531
Equity Jurisprudence	69
Specific Performance of Contracts	66
Pretrial Conference Under the Federal Rules of Civil Procedure, 18 Texas Law Review, 190 (1940)	547
Pretrial Hearings and Assignment of Cases, 33 Illinois Law Review, 699	547
Pretrial Procedure, Sixth to Eleventh Annual Reports of the Judicial Council of Michigan, p. 63	547
Some Practical Considerations, 26 Am.Bar Asso. Journal, 592	547
Pre-Trial Proceedings, Handbook, National Conference of Judicial Councils (1942), p. 95	546
Proper Generality of Allegation in Pleading under the Federal Rules, 4 Fed.Rules Serv. 890 (1941)	250
Prosser, Torts	12, 53, 54, 156, 186, 193, 240
Ragland, Discovery before Trial	251
Reppy, The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practices Acts, 6 N.Y.U.L.Rev. 95 (1929)	514
Scott & Simpson, Cases on Judicial Remedies	269
Shientag, Moulders of Legal Thought	318
Summary Judgment, 4 Fordham L.Rev. 186	578
Shipman, Common Law Pleading	18, 79, 277, 293, 336, 509, 516
Simpson, Fifty Years of American Equity, 50 Harv.L.Rev. 171 (1936)	319
Stephen, Pleading (5th American ed.)	267
Pleading (Williston's ed.)	363, 364, 365, 366, 407, 514, 537, 653
Street, The Foundations of Legal Liability	17
Study of Perjury: V. Statistics on Enforcement of Perjury Laws, in N.Y.Law Revis.Comm'n, Report 231, 285 (1935)	538
Sunderland, The New Michigan Court Rules, 29 Mich.L.Rev. 586 (1931)	535
The Theory and Practice of Pretrial Procedure, 36 Mich.L.Rev. 215	251, 547

TABLE OF ARTICLES, BOOKS, ETC.

[The reproduction or quotation of extracts is indicated by a page
reference in italics.]

Sutton, Personal Actions at Common Law	28, 281
Writ in Trespass for Assault and Battery, Personal Actions at Com- mon Law, 19 (1929)	269
Walsh, Equity	69, 73
Wigmore, Evidence	617, 622
Willis, Federal Discovery in Operation, 7 Chi.L.Rev. 297 (1940)	260
Wiren, The Plea of the Ius Tertii in Ejectment, 41 L.Q.Rev. 139 (1925)	32

†

THE ELEMENTS OF LEGAL CONTROVERSY

An Introduction to the Study of Adjective Law

PART I.

INTRODUCTION: THE OBJECTS OF THE COURSE

Students of law wish, and not unreasonably, to know how particular courses in law are designed to contribute to their education,—what knowledge, understanding and skills each course is intended to impart to them, and by what means. You will surely ask such questions about this, your first, although not your only course, in the law of civil procedure, as well as about your other courses. The purpose of this introduction is to anticipate and to try to answer your questions about it.

Merely by asking such questions, you indicate that you realize that education is a practical affair and that a course of instruction is only a means to one or more ends. But questions about ends are prior to questions about means. We solve a practical problem in *thought* by determining the end we wish to achieve and the most efficient means for accomplishing our purpose. We solve a practical problem in *action* by using the means we have chosen to attain the end we desire. But since means are chosen and used for the sake of ends, ends are the first things to be thought about in the order of practical thinking. Consequently, your first question about this course should ask about its ends,—what they are and whether they are what they ought to be.

Any teacher's answer to the question what ends a course in law ought to serve, will depend upon his philosophy of law in general and of particular branches of law, upon his philosophy of legal education, and even upon his intellectual interests and tastes; and teachers of law, perhaps fortunately for you, differ in those respects. Hence, as you will discover, they disagree both about the ends which legal education in general should serve and the ends which particular courses of instruction should serve, although they probably disagree more about means than about ends. Moreover, almost any course-book in law can be used to accomplish other purposes than those of its author.

Nevertheless, it can best be understood in terms of his purposes for it will inevitably reflect them.

The author of this course is of the opinion that the final or ultimate end of legal education ought to be the good artist¹ in law,—the good practitioner of law as an instrumentality of government or the good scientist in law. To be a good artist in law, a lawyer must, in the first place, possess the theoretical bases of the arts of law. In short, he must have a profound understanding of law as a political instrumentality and of law as a science;² he must possess all other knowledge, common and special, which is germane to his artistic tasks; and he must be a master of the principles and rules of the arts of law, those principles and rules by which law can be most effectively employed in the government of a political society and most effectively developed as a science. He must, in the second place, possess those intellectual habits which will confer upon him an aptness for good work, good habits of learning and knowing, of thinking and communicating, and of doing. It is to such habits that we refer when we speak of the skills or techniques or craftsmanship of the lawyer. But since a lawyer may have an aptness for good work without the habit of using his aptness rightly, to be a good artist in law a lawyer must, in the third place, be both a prudent man and a just man, for only the virtues of prudence and justice will cause him to use his aptness both well and for the right end which, in the legal order, is the common good or the public welfare. It is a maxim of morality that according as a man is, so does the end seem to him. That is why a lawyer must be a just as well as a prudent man, a man who is good socially and who, therefore, is directed not only toward his own good and that of his clients, but also to the good of other men, the common good of the society in which he practices his profession.

All of this can be summarized by saying that in order to achieve its final end of the good artist in law, legal education must be not only intellectual but moral and practical as well.

¹ By "art" in this connection is meant the employment of means to accomplish desired ends. The making, the administration and the enforcement of law are practical arts, arts of doing.

² Perhaps the outstanding feature of law is its multiformity. In one aspect law is a political instrumentality, an instrumentality of government, whereby a political society can be regulated for better or for worse. In this aspect law is a means to an end and legal problems are practical problems, problems of means and ends. In this aspect law seeks justice. In another aspect law is a science which is often called, quite generally, a social science or, more specifically, legal sociology, although it contains psychological as well as sociological elements. In this aspect law is knowledge about matters of fact and legal problems are theoretical or speculative problems, problems of knowledge. In this aspect law seeks truth.

It must be intellectual in the sense that it must seek to impart to its students the theoretical bases of the artistic tasks of the lawyer and to develop in them good intellectual habits. It must be moral in the sense that it must try to develop their prudence and their justice. It must be practical in the sense that it must give them practice in the performance of the lawyer's arts, for in practical activities only practice makes perfect. These, then, should be the intermediate ends of legal education, the proximate means to its final end of the good artist in law, and legal education in all its parts, including, of course, instruction in the law of civil procedure, should serve them, although it need not in each of its parts serve all of them or serve them in the same ways.

The arts with which the law of civil procedure is concerned, are those which are involved in the conduct of litigious controversy. Indeed, as you will see for yourselves, the law of procedure is unique in that it is the only body of law which consists mainly of rules of operation, the immediate purpose of which is to guide the lawyer in the performance of his artistic tasks. The substantive law, which regulates affairs in which the lawyer participates only as the counselor, negotiator or draftsman of his client, contains few if any principles or rules to guide him in those activities. However, you must understand that instruction in procedural law will not give you the theoretical bases of the arts of controversy if it only informs you what the rules of procedure are and how they have been applied. It must also make the rules intelligible to you and give you the capacity to criticize them.

Now, there are two closely related ways in which rules of law can be understood and criticized: on the one hand, in terms of the nature of what they regulate, and, on the other, in terms of the ends which regulation is designed to serve. Thus, rules of substantive law are intended to regulate political, social and economic affairs; and their regulation should ultimately serve the end of justice in the state. We can understand substantive law in the light of the political, social and economic processes which comprise the life of the state; and we can criticize the various substantive rules by reference to what constitutes a just regulation of those processes. The distinction between political justice and political injustice is ultimately the distinction between a good and a bad state of social affairs. The understanding and the criticism of substantive law as a set of conventions regulating social life, which can be made better or worse by regulation, are thus seen to be closely related.

Just as rules of substantive law regulate political, economic and social affairs, so rules of procedural law regulate the intellectual affair which we call controversy. Controversy does not

occur exclusively in courtrooms or before official tribunals; it occurs whenever and wherever two individuals disagree and contradict one another. Moreover, its essential nature is the same, whenever and wherever it occurs. Men dispute both about theoretical matters, about what *is* the case in some respect, and about practical matters, about what *ought* to be done in some respect. Their disputes, in short, are both practically and theoretically motivated, and create both practical and theoretical issues. Indeed, as we shall see, legal controversy differs from other controversy which is practically motivated in only three respects, all of which are accidental to the nature of controversy. First, the theoretical issues, the issues about matters of fact, involved in legal controversy, must be issues about matters of fact which are legally significant. Second, the practical issues, the issues about what ought to be done, involved in legal controversy, must be issues of law. And third, the immediate practical consequence of the resolution of the issues of law and of fact of which a legal controversy is constituted, must be the award or denial of a legal remedy.

The processes involved in legal as in other controversy are the formulation, the trial and the decision of issues and the determination of the consequences of their resolution. These processes involve only intellectual activities and are conducted solely by means of language. An issue of fact is formed by contradiction, by the assertion and denial of a proposition. Analogically, it can be said that an issue of law is also formed by contradiction, by the assertion and denial of a statement about a matter of law. An issue of law is tried by argumentation and decided by deliberation, that is, by the calculation of the advantages and disadvantages of pursuing the alternative courses of action of which the issue is composed. An issue of fact is tried by evidence, that is, by the proof and disproof of the propositions of which the issue is constituted, and decided by the calculation of their relative probabilities. The processes of controversy and the intellectual activities which they involve, are not created, they are only regulated, by procedural law. Consequently, the understanding of procedural rules depends upon an understanding of what they regulate, just as the understanding of substantive rules depends upon knowledge of society and of the state.

To issues of law there are just and unjust answers and to issues of fact there are correct and incorrect answers. The processes of controversy are rational or irrational according as they are or are not directed toward obtaining the better answers to issues of law and of fact. But they will not be directed toward obtaining the better answers unless they conform to the ways of reason in the pursuit of truth and of justice. The formation,

the trial and the resolution of issues which occur in legal controversy are special cases of those activities only in the sense that they are regulated by a special set of conventions, the rules of procedural law. If they are rational as they occur in litigation, it must be because they are regulated by rational principles. The legal conventions can make litigation a rational enterprise only by requiring that it be conducted rationally. To the extent that they do, an analysis of the rational character of the processes of contradiction, proof, persuasion, and deliberation will aid in the understanding of procedural law. The legal rules can thus be seen to be conventions which are founded in the nature of the affairs which they regulate, rather than arbitrary ones.

You can nevertheless ask whether procedural law ought to serve the end of the rational conduct of legal controversy. It is easy to demonstrate that it should. Procedural law, like substantive law, should serve the end of justice; whether or not it does is the root of our criticism of it. It can serve the end of justice only by so regulating the formation, the trial and the resolution of issues of law and of fact that legal controversies will be justly resolved. But, as this course hopes to make clear to you, procedural law is subordinate to substantive law, and every legal controversy is governed by a rule of substantive law which determines what propositions about matters of fact are material to the controversy. The justice of the resolution of a legal controversy therefore depends upon two factors, the justice of the rule of substantive law by which it is governed and better rather than worse answers to the issues of which it is constituted. But, as we have seen, a method of procedure must be rational in order, except by chance, to achieve the better answers. Consequently, the rules of procedure should so regulate legal controversy that its methods will be rational, that is, those which reason demands.

You must not misunderstand this to mean that procedural law does not or should not serve other ends than the just resolution of legal controversies. It does and it should. After all, the final end of procedural law as well as of substantive law is justice, the common good. The just resolution of legal controversies is only a means to that more remote end. But means which are well adapted to the just resolution of legal controversies may disserve other social values which either are or are regarded as being more important for the welfare of the community than the just resolution of controversies between its members, such, for example, as economy in the expenditure of public funds, the tranquility of the community, and one or another civil liberty. Whenever that is actually the case, procedural law is justified

in serving those other ends which, for the sake of brevity, we can call tangential ends, even though in serving them it disserves its primary end, the just resolution of controversies. This is the problem, so important for procedural law, which is often named the problem of conflicting values. But this is a misnomer, for social values do not and cannot conflict with one another. The point is that a rule of law which is well adapted to one social objective may be ill adapted to another, and we must then determine which of the two objectives we value more highly and shall therefore try to achieve.

The parties to legal controversies, the lawyers by whom their controversies are conducted, and the officials by whom their controversies are decided, are human beings. If all litigants were just men and if lawyers and officials were both just and competent, there would be no need for procedural rules other than those designed to insure that the processes of controversy shall conform to the ways of reason in the pursuit of truth and justice and those intended to serve other social values than the just resolution of controversies, except, of course, rules designed to insure the orderly and efficient functioning of the machinery of justice. But instead of being just men, many, perhaps most, litigants are selfish and greedy men and too many lawyers identify themselves with their clients. Moreover, justice does not always sit in the seat of judgment. So, there are procedural rules which are intended to protect the litigants against selfishness and avarice and stupidity and incompetency and partiality. These can be viewed in large part as rules intended to reënforce and to fortify the rules designed to make litigation a rational enterprise.

The author hopes that he has now succeeded in making clear to you why it is that if instruction in procedural law is to impart to you the theoretical bases of the arts of controversy, it must attempt not only to inform you what the rules of procedure are and how they are administered but also to teach you much else. For example, since legal controversy is conducted by means of words, you need some knowledge about the use of words as symbols, that is, some grammatical knowledge. Since issues of fact are constituted of contradictory propositions, are formed by the assertion and denial of propositions, and are tried by the proof and disproof of propositions, you need some knowledge of the nature of propositions and of the relationships which can obtain among them, and of the character of issues of fact and of proof and disproof, that is, some logical knowledge. Since the propositions which are material to legal controversy can never be proved to be true or false but only to be probable to some degree and since issues of fact are resolved by the calculation of the rela-

tive probabilities of the contradictory propositions of which they are composed, you need some knowledge of the distinction between truth or falsity and probability and of the logic of probability. Since propositions are actual or potential knowledge, since proof or disproof is an affair of knowledge, since, if they are truthful, the parties to legal controversy assert, and witnesses report, their knowledge, and since knowledge is of various sorts, you need some knowledge about knowledge, such, for instance, as knowledge of the distinction between direct or perceptual and indirect or inferential knowledge. Since there are intrinsic and essential differences between law and fact, between propositions about matters of fact and statements about matters of law, and between issues of fact and issues of law and the ways in which they are respectively tried and resolved, you need some knowledge about these matters. Since litigants and all those who participate in the conduct and resolution of their controversies are men and since many of the procedural rules are based upon presuppositions about human nature and behavior, you need some psychological knowledge. Finally, of course, you need such knowledge as is necessary to enable you to understand the tangential ends which are served by procedural law and to criticize the rules which are designed to serve them. However, teachers of law have learned from bitter experience that when you begin to study law most of you will not possess the knowledge of grammar or logic or rhetoric or epistemology or psychology which you need, to mention only some of the respects in which the prior education of students of law has too often been discovered to be inadequate for the study of law.

You will recall that to be a good artist in law, a lawyer must possess not only the theoretical bases of the arts of law but also good intellectual habits, and in addition he must be a prudent and a just man. You will soon discover that dialectic, rather than the lecture, and statutes and cases, actual and imaginary, rather than texts, are among the chief instruments of instruction in civil procedure as of legal education in general. This is in large part due to the fact that experience has revealed that the discussion of particular legal problems is the more effective method of helping you develop good habits of knowing, of thought, and of speech. You must also appreciate the significance of the systematic criticism of legal rules for your moral education. The prudent man is the man who, before acting, habitually seeks the knowledge which is relevant to the practical alternatives which he faces and habitually chooses between them in the light of such knowledge, and who habitually acts in accordance with his choice. Every rule of law, substantive and procedural, represents a choice by officials between alternative

courses of action, and it can always be asked whether or not the choice was a prudent one. For you to ask and attempt to answer that question is, therefore, a means of developing your own prudence. Moreover, justice and injustice are qualities of laws as well as of men, and the justice of laws can be judged by the same criterion as the justness of men. Laws are just precisely to the extent that they serve the common good. Consequently for you to ask and to attempt to determine whether or not particular rules of law, substantive and procedural, are just, is a means of developing your own sense of justice.

So much, then, for the ends of instruction in the law of civil procedure in general. Neither this nor any other introductory course can serve all or fully attain any of those ends. If we call the arts which are involved in the conduct of legal controversy the arts of advocacy, we can say that the principal object of this course is to begin the process of helping you become good advocates. More specifically, its major objectives are (1) to give you an understanding of the character of legal controversy as both adversary and intellectual; of procedural law as a body of conventions which regulate the issue-forming, issue-trying and issue-deciding processes involved in legal controversy and which are designed in part to make it a rational affair and in part to serve tangential ends; of the subordination of procedural law to substantive law; and of the functions of the lawyer, the jury and the judge in the conduct and resolution of a legal controversy; (2) to impart to you some of the knowledge which constitutes the theoretical basis of the arts of advocacy and to cooperate with other courses in assisting you to become more prudent and more just men and to develop good habits of knowing, thinking, and communicating; and (3) to exhibit to you the nature of issues of law and of fact and to make you see that the formation of issues is logically prior to their trial and resolution, and that the process of pleading is therefore only a preliminary to the process of proof, just as the latter is only a preliminary to the processes of persuasion and deliberation which must follow it, and to instruct you in the law of pleading, the body of rules which regulate the formation of issues.

In almost every if not every legal controversy one of the parties, the plaintiff, is seeking to obtain, and the other of the parties, the defendant, is seeking to prevent him from obtaining, a legal remedy. The course therefore begins with a consideration of legal remedies as modes of righting or preventing legal wrongs. This should serve to reveal legal controversy as practically motivated and to orientate all that follows. Especially, it should put you on the way to understanding the relationship of procedural law to substantive law. The course then turns to

the conception of cause of action as the legal and factual conditions of obtaining a remedy, and, subsequently, to the conception of defenses as the legal and factual conditions of avoiding a remedy. This should serve to make clearer the relationship between procedural and substantive law and the subordination of the former to the latter. Your understanding of these matters should be enlarged by the consideration of the formal structure of a complaint, the statement of a cause of action, and of an answer, the statement of a defense, of the adequacy of particular attempts to state causes of action and defenses, and of the distinctions between propositions which are material and those which are immaterial to causes of action and defenses and between the substantive adequacy and the procedural regularity of the statement of a cause of action or defense. And the consideration of the procedural consequences of both negative and affirmative defenses should serve to prepare you to move into advanced courses in civil procedure which are concerned with the trial and resolution of issues of law and of fact. During your consideration of these matters you should be able to acquire much of the intellectual apparatus required for the understanding and criticism of the legal rules regulating the processes of contradiction, proof, persuasion and deliberation which are inevitably involved in legal controversy.

At the end of the second part of the course, it digresses from its main theme, which it resumes in the fourth part, in order to acquaint you with the strictly procedural aspects of the formulary, that is, the common law system of civil procedure. This system has now been superseded almost everywhere by what is known as reformed or code procedure. Consequently, teachers of civil procedure disagree as to whether or not the formulary system should be studied any longer, and some teachers of this course may decide to omit this part of it as having only antiquarian interest. However, the author of this course is of the opinion that you will find it profitable to examine the formulary system briefly for the light that will thereby be thrown on the course of procedural reform, the current philosophy of civil procedure, the existing procedural system and contemporary procedural rules, and, perhaps most important of all, strongly entrenched professional attitudes and habits of thought.

In conclusion, a word of admonition. Just as it was impossible for the author to write this introduction before he had created the course, so it will be impossible for you to understand it fully until you have completed the course. Consequently, you should re-read it from time to time as the course progresses.

Part II

MODES OF RIGHTING LEGAL WRONGS

Chapter I

REMEDIES

SECTION 1. MEANS OF OBTAINING REMEDIES

BLACKSTONE, COMMENTARIES

Lewis' ed. 1922. iii, *2-*6.*

Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes and misdemeanors*. . . .

The more effectually to accomplish the redress of private injuries courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these courts of justice; that is, by civil suit or action But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentric kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit. . . .

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects the passions of the human mind, and (when external violence is

* This and all other extracts from this work quoted in this book are included by permission of Geo. T. Bisel Co., the publisher. The author's footnotes have been omitted.

offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defence and prevention: for then the defender would himself become an aggressor.

II. Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.

III. As recaption is a remedy given to the party himself for an injury to his *personal* property, so, thirdly, a remedy of the

same kind for injuries to *real* property is by *entry* on lands and tenements when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force. . . .

IV. A fourth species of remedy by the mere act of the party injured is the *abatement* or *removal* of nuisances. . . . If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land and peaceably pull it down. Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraint*ing cattle or goods for the non-payment of rent, or other duties; or distraining another's cattle *damage-feasant*, that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.¹

NOTES

(1) Kohler, *Philosophy of Law*, 243-244 (Albrecht's trans. 1921)*: "[R]ealization of the law through the State avoids all those imperfections which self-help involves.

"(a) The State can obtain a correcter perception of a right in question than can the individual, who moreover is often blinded and prejudiced.

"(b) The State is always the stronger when it is a question of overcoming an individual, and it is no longer a matter of importance which of the two parties at variance is mightier; the State aids the weakest man and overcomes the strongest if the latter is in the wrong.

"(c) The State is free from blind passions, and can devote itself unreservedly to the aims of the law; while the individual, in consequence of his passionate intentions, will act contrary to

¹ Contemporary rules regulating "self-help" are considered in the Torts, Criminal Law, and other substantive courses. See Prosser, *Torts*, 125-137 (1941), for a statement of some of these rules.

* By permission of The Macmillan Company, the publisher.

the law a hundred times, the State, in every single case, will be concerned only with the realization of the right."

(2) Cooley, Torts, §§ 42-43 (4th ed. 1932)**: "[T]he privilege of redressing one's own wrongs is not to any great extent permitted to individuals; indeed, the state cannot afford to clothe individuals with its own powers for the purpose of enforcing its laws according to their own judgments, especially when in enforcing the laws they would only be judging of and redressing their own grievances. Order is no less the law of human governments than of the divine government, and individual convenience must be subordinated to it. The cases which are above mentioned are in the main to be regarded as cases in which the individual is permitted to act on his own behalf, in order that he may prevent a mischief already begun from becoming more serious. He interposes obstructions to the lawless conduct of others, he protects his person, he reclaims his property; but only on the condition that he can do so without a breach of the public peace; and he abates a nuisance on the same terms. But to obtain redress for any wrong done him he must invoke the assistance of the law.

"The redress the law will give will be suited to the injury suffered. If one's land is taken from him, he shall have the proper writ for its recovery. If personal property is taken which he prefers to recover rather than have judgment for its money value, he may demand back the thing itself. But the principal remedy, and for the most part the only available remedy which the law can give for a wrong, is an award of money estimated as an equivalent for the damage suffered."

LANGDELL, EQUITY JURISDICTION

2d ed. 1908. 19, 22.*

It is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure. . . . In equity the term "relief" is commonly used instead of "remedy"; and, though relief is a much more technical term than remedy,

** By permission of Callaghan & Company, the publisher.

* By permission of Harvard Law Review Association, the publisher.

it has the advantage of being equally applicable to all the different modes of protecting rights. . . .

Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit; *i.e.*, that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate, —not to each separately.¹

SECTION 2. RESTITUTION

BLACKSTONE, COMMENTARIES

Lewis' ed. 1922. iii, * 116, * 145-* 146, * 151-* 152, * 153-* 154.²

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded; or, where that is not a possible, or at least not an adequate, remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, etc.: to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror to be "the lawful demand of one's right;" or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur*.³ . . .

The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that pos-

¹ As Professor Langdell proceeds to point out, in English speaking countries there are several systems of law of which the principal ones are the "common law" and "equity." There are thus "legal" remedies and "equitable" remedies which either are or once were administered by different systems of courts. How all this came about and what the practical consequences of this variety of systems of remedies and courts were, are matters with which we are not now concerned, but with which you will be very much concerned in other courses. Our purpose at present is to try to understand the nature of a remedy and to learn what the principal remedies are, without asking whether they are legal or equitable or how they came to be the one or the other.

² All footnotes are by the editor of the Commentaries.

³ [The right of prosecuting to judgment for what is due to any one.]

session; and the abuse or damage of the chattels while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of *replevin*; an institution which the Mirror ascribes to Glanvil, chief justice to King Henry the Second. This . . . and the action of *detinue* . . . are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*Lex neminem cogit ad vana seu impossibilia*,"³ it therefore contents itself in general with restoring, not the thing itself but a pecuniary equivalent, to the party injured; by giving him a satisfaction in damages. . . .

2. Deprivation of possession may also be an unjust *detainer* of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage-feasant, and before they

³ ["The law compels no one to do anything which is useless or impossible."]

are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them: in which he shall recover damages only for the *detention* and not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining and not in the original taking, and the regular method for me to recover possession is by action of *detinue*.

. . .

As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes; by action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant. And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit.

NOTE ON DETINUE AND REPLEVIN

Detinue and replevin were the only common law forms of action¹ by which a person might obtain restitution of personal property of the possession of which he was being wrongfully deprived.² Replevin was the appropriate action if the thing was taken from him against his will, and detinue, if it was not, but was being wrongfully withheld from him.³ This difference in the scope of the two actions was expressed traditionally by saying that the gist of replevin is an unlawful taking and of detinue, an unlawful detention. However, as the result of decision or statute detinue and replevin tended to become alternative

¹ For a brief account of these forms, see *infra* pp. 261-266.

² For a comparison of them, see *Dame v. Dame*, 43 N.H. 37 (1861).

³ *Mennie v. Blake*, 6 E. & B. 843, 119 Eng. Rep. 1078 (Q. B. 1856).

actions. Almost everywhere it became possible to maintain detinue in cases of unlawful taking⁴ and replevin in cases of unlawful detention.⁵ For this reason and because, as we shall see, replevin was the more advantageous action for a plaintiff,⁶ that action or a statutory action fashioned upon it largely superseded detinue.

The conditions of maintaining detinue and replevin were similar. (1) Neither could be maintained except for an identifiable article of personal property⁷ which, in the case of replevin, had to be in existence⁸ and in the defendant's possession⁹ when the action was begun, unless he had parted with possession wrongfully.¹⁰ (2) Either action could be maintained by one who had a "general or special property" in the thing and the right to its immediate possession. But this condition was variously interpreted.¹¹ (i) In one view the plaintiff's property in the thing was unimportant except in its bearing upon his right, as against the defendant, to possess it; and he might establish that right in either of two ways. He might prove that he was in peaceful possession of the thing when the defendant took it; and in that event the defendant could defeat his action only by showing a superior right in himself. Or the plaintiff might prove that he had such a "property" in the thing as entitled him to its immediate possession; and in that event the defendant could defeat his action by showing a better title in either himself or another, although that other was a stranger to him.¹² In this view, therefore, "bare possession" was sufficient "title" to enable a plaintiff to maintain either action against a "mere" trespasser, that is, one who had no legal interest in the thing whatever.¹³ (ii) In the

⁴ *Peirce v. Hill*, 9 Port. 151, 33 Am. Dec. 306 (Ala. 1839).

⁵ *Badger v. Phinney*, 15 Mass. 359 (1819). Cf. 3 Street, *The Foundations of Legal Liability*, 207 (1906): "At present replevin is distinguished from detinue chiefly by the circumstance that in the latter remedy possession is not recovered until the action is terminated, while in replevin the chattels in dispute are, upon the giving of a bond for their forthcoming, put into the hands of the plaintiff at the beginning of the suit."

⁶ See note 4, *supra*.

⁷ *Ricketts v. Dorrel*, 55 Ind. 470 (1870); *Dorr v. Dudderar*, 88 Ill. 107 (1878); *Keyes v. Konkel*, 119 Mich. 550, 78 N.W. 649, 44 L.R.A. 242, 75 Am. St. Rep. 423 (1899); *Brown v. Ellison*, 55 N.H. 556 (1875).

⁸ *Caldwell v. Fenwick*, 2 Dana 333 (Ky. 1834).

⁹ *Mitchell v. Roberts*, 50 N.H. 486 (1871); *Jones v. Keebey*, 159 Ark. 586, 252 S.W. 591 (1923).

¹⁰ *Jones v. Dowle*, 9 M. & W. 19, 152 Eng. Rep. 9 (Ex. 1841); *Sinnott v. Feiock*, 165 N.Y. 444, 59 N.E. 265, 53 L.R.A. 565, 80 Am. St. Rep. 736 (1901); *Andrews v. Hoeslich*, 47 Wash. 220, 91 P. 772, 18 L.R.A., N.S., 1265 (1907); Note, 18 L.R.A., N.S., 1265 (1909). But see *De Lore v. Smith*, 67 Or. 304, 136 P. 13, 49 L.R.A., N.S., 555 (1913).

¹¹ See Note, 150 A.L.R. 163, 189 (1944); Note, 27 Mich. L. Rev. 936 (1929); *Finkelstein, The Plea of Property in a Stranger in Replevin*, 23 Col. L. Rev. 652 (1923).

¹² *Sanford v. Millikin*, 144 Mich. 311, 107 N.W. 884 (1906).

¹³ *Anderson v. Gouldberg*, 51 Minn. 294, 53 N.W. 636 (1892); *Huddleston v. Huey*, 73 Ala. 215 (1882); *Traylor v. Marshall*, 11 Ala. 458 (1847).

other view bare possession of the thing was never enough even as against a mere trespasser; it was necessary in all cases that the plaintiff should have at least a limited property in the thing. In this view, therefore, it was never sufficient for the plaintiff to prove possession alone; and the defendant could always defeat the action by showing a superior title in himself or any one else.¹⁴

There were important differences as well as similarities between the two actions. (1) As pointed out above, until their scope was extended replevin lay only in cases of wrongful taking, and detinue, only in cases of wrongful detention. (2) By means of the writ of replevin and with the sheriff's aid the plaintiff could at the very beginning of a replevin action get possession of the thing, if it could be found, although only provisionally, whereas the plaintiff in detinue could get possession of it only at the end of the action. (3) There were corresponding differences in the judgments which could be rendered in the two actions. The judgment in detinue, if for the plaintiff, in effect awarded him *either* the possession *or* the value of the thing, at the defendant's option, with damages for its unlawful detention;¹⁵ and, if for the defendant, awarded him his costs. On the other hand, the judgment in replevin, if for the plaintiff, awarded him continued possession of the thing and damages for its unlawful taking and detention; and, if for the defendant, required the plaintiff to restore the thing to him and awarded him such damages as he had sustained by the disturbance of his possession.

Shipman describes the procedure in common law replevin as follows:¹⁶ "The plaintiff first procured a writ from the court of chancery, directed to the sheriff and commanding him to seize the property and deliver it to the plaintiff, upon his giving security to prosecute an action against the other party to determine his right to the property, and to return it if the action should go against him. If the sheriff could seize the property under this writ, he did so, and delivered it to the plaintiff, who was then bound to prosecute his action. If the property could not be replevied, because sold or disposed of by the defendant

¹⁴ Walpole v. Smith, 4 Blackf. 304 (Ind. 1837); Robinson v. Calloway, 4 Ark. 94 (1842); Ingraham v. Hammond & Mead, 1 Hill 353 (Sup. Ct. N.Y. 1841); Miller v. Adsit, 16 Wend. 335 (N.Y. Ct. Errors 1836); O'Neal v. Baker, 2 Jones L. 168 (N.C. 1855); Waterman v. Robinson, 5 Mass. 303 (1809).

¹⁵ Cf. Maitland, *The Forms of Action at Common Law*, 62 (1936): "[T]he defendant [in detinue] when worsted is always allowed the option of surrendering the goods or paying assessed damages. The reason of this may perhaps be found partly in the perishable character of medieval moveables, and the consequent feeling that the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a 'legal price' which, if the plaintiff gets, is enough for him."

¹⁶ Common Law Pleading, 122 (3d ed. 1923).

or for any other reason, the plaintiff might still bring his action, and his recovery would be the full value of the property."

In most of the United States common law replevin has been replaced by a statutory action which is called replevin or an action in claim and delivery or an action to recover a chattel. While the statutory action is in general regulated by the same rules as its common law predecessor, there are important differences between them, among which are the following: (1) The statutory action is begun by the issuance and service of a summons instead of by the issuance of a writ of replevin and the seizure of the thing. Consequently, the action may proceed although the thing is not replevied by the plaintiff.¹⁷ (2) By filing an affidavit disclosing that he is entitled to the immediate possession of the thing and that the defendant is wrongfully detaining it, an undertaking to prosecute the action and to return the thing to the defendant if the judgment should award possession to him, and a requisition addressed to the sheriff requiring him to seize the thing, the plaintiff may replevy it either when the action is commenced or at any time prior to final judgment. (3) If he does so, the defendant may in some states have the thing restored to him, pending the action, by filing an affidavit of ownership or right to possession and an undertaking, known as a redelivery bond, to deliver the thing to the plaintiff, if the judgment should award possession to him, and to pay him the damages awarded thereby. This procedure is known as "bonding back." (4) The judgment awards the successful party, whether plaintiff or defendant, possession of the thing or its value, if the thing cannot be delivered to him or, in some states, at his election, together with such damages as he may have sustained.¹⁸

BUTLER v. WOLF SUSSMAN, INC.

Supreme Court of Indiana, 1943.
221 Ind. 47, 46 N.E. 2d 243, 145 A.L.R. 740.

SHAKE, J. In 1920 the appellant inherited a diamond ring from her mother. She afterwards married and lived with her husband for thirteen years, separating on January 8, 1940. They are not divorced but the husband's whereabouts is unknown. While packing her possessions at the time of the separation,

¹⁷ See *Deschenes v. Beall*, 61 Wyo. 39, 154 P. 2d 524 (1945); *Stone v. Church*, 172 Misc. 1007, 16 N.Y.S. 2d 512 (County Ct. 1939). But see *Johnson v. Terry*, 48 N.M. 253, 149 P. 2d 795 (1944).

¹⁸ See *Pavlis v. Atlas-Imperial Diesel Engine Co.*, 121 Fla. 185, 163 So. 515 (1935); *Kunz v. Nelson*, 94 Utah 185, 76 P. 2d 577, 115 A.L.R. 1322 (1938); *Lawer Auto Supply v. Teton Auto Co.*, 41 Wyo. 263, 284 P. 1001, 67 A.L.R. 1492 (1930). But see *Johnson v. Terry*, *supra* note 17.

the appellant missed her ring. She made a demand for it upon her husband and threatened to sue him, whereupon he produced and delivered to her a ticket disclosing that on November 18, 1938, he had pledged the ring as his own to the appellee, a licensed pawnbroker, for a loan of \$25, which was afterwards increased to \$35. This was without the prior knowledge of the appellant.

The appellant's complaint is in three paragraphs. The first and third are for replevin¹ of the ring and the second for its conversion. There was an answer in general denial which was not good under the requirements of Rule 1-3 (1940 Revision).² The appellant would have been entitled to judgment on the pleadings for the possession of her ring had she asked for it,³ but she waived that relief by going to trial on the merits. 1 Watson's Works Practice, §§ 633 and 634.

There was a trial by the court resulting in a judgment to the effect that the appellant take nothing. The only alleged error properly presented is that the decision is contrary to law. In support of the judgment the appellee says: (1) That there was no evidence of a demand upon it for the return of the ring prior to the commencement of the action; and (2) that the appellant was not entitled to recover by reason of the Acts of 1935, ch. 195, § 32, § 18-3233, Burns' 1933 (Supp.), § 13220-33, Baldwin's Supp. 1935. This statute provides:

"A pawnbroker shall have a first lien on all pledges for the amount of his loan, interest and charges in all cases except where the pledging or possession thereof by the pledger constituted larceny at the common law, or except where a prior lien exists by virtue of any other statute."

The first question for consideration is whether a demand was necessary. The general rule appears to be that replevin will not lie for property lawfully in the possession of another until a proper demand has been made for its delivery. *Lewis v. Masters* (1846), 8 Blackford 244; *Torian v. McClure* (1882), 83 Ind. 310. This rule is based upon the presumption which the law indulges that one who has lawfully come into possession of property which he is not entitled to retain will, upon demand,

¹ Ind. Stat. Ann. § 3-2701 (Burns 1933): "When any personal goods are wrongfully taken, or unlawfully detained, from the owner or the person claiming the possession thereof, . . . the owner or claimant may bring an action for the possession thereof."

² This rule provides: "The party answering or replying to a pleading shall state, without enlargement or elaboration, that he (1) admits, (2) denies, or (3) is without information as to the facts stated in each rhetorical paragraph or each designated part of such paragraph."

³ Because the rule set forth in note 2 required denials to be specific.

surrender it to the person entitled thereto and that he ought to be afforded an opportunity so to do without being subjected to the inconvenience and expense of a law suit. 54 C. J., Replevin, § 69b, p. 449. *Wood v. Cohen and Another* (1855), 6 Ind. 455. The rule stated has been so applied as to require a demand, where the defendant is an innocent purchaser for value and without notice from one who was a wrongful taker or was without authority to sell. *Torian v. McClure, supra*; *Conner and Others v. Comstock and Others* (1861), 17 Ind. 90; *Wood v. Cohen and Another, supra*; *Ledbetter v. Embree* (1895), 12 Ind. App. 617, 40 N. E. 928. The application of these principles would seem to have required a demand under the facts of the case at bar.

The appellant contends, however, that the appellee waived necessity for a demand by filing a redelivery bond, by contesting the suit on its merits, and by claiming the protection of § 32 of the Pawnbrokers Act of 1935. The cases of *Hays v. Burns* (1939), 106 Ind. App. 374, 19 N. E.2d 862, and *Jordan v. Jordan* (1922), 78 Ind. App. 617, 136 N. E. 866, are relied upon. The first case goes no further than to hold that no demand is necessary where, prior to the commencement of the action, the party in possession assumes a position disclosing that if a demand had been made it would have been unavailing. The second case holds that a waiver may result from the character of the defense made to the action as well as from the statements and conduct of the defendant prior thereto. We have found no Indiana case indicating what particular conduct, subsequent to the commencement of the action, will constitute a waiver of a demand. It would seem, however, that since a defendant, if sued without a demand, may offer to disclaim any interest in the property upon reimbursement for costs incurred, any affirmative conduct on his part calculated to establish title in himself, whether by pleading or proof, ought to waive a demand. *Raper v. Harrison* (1887), 37 Kan. 243, 15 P. 219; *Kellogg v. Olson* (1885), 34 Minn. 103, 24 N. W. 364; *Thompson v. Thompson* (1902), 11 N. D. 208, 91 N. W. 44. We hold, therefore, that by claiming title to the ring in controversy over the asserted ownership of the appellant, the appellee waived necessity for a demand.

Section 32 of Chapter 195, Acts of 1935, undertakes to give licensed pawnbrokers a first lien on all articles pledged to them except where the pledge or possession thereof by the pledger constituted larceny at common law or a prior lien exists by virtue of a statute. At common law, husband and wife were considered as one person and one spouse could not commit larceny of the goods of the other; but by a statute in force in this State since 1881, a married woman has been authorized to take, ac-

quire, and hold personal property and to sell, barter, exchange, and convey the same as if she were unmarried. Acts of 1881, ch. 60, § 2, p. 527, § 7853, Burns' 1914, § 5645, Baldwin's 1934; Acts 1923, ch. 63, § 2, § 38-102, Burns' 1933, § 5645, Baldwin's 1934. It follows that by virtue of this statute the appellant took an unqualified title in the diamond ring which she inherited from her mother; that her husband had no interest therein; and that he might have been held criminally liable for the larceny thereof. *Beasley v. State* (1894), 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418.

Under the facts disclosed by the record, the appellant had a vested interest in the property in controversy of which she could not be divested without due process of law. Section 32 of the act relied upon by the appellee violates the due process provisions of the State and Federal Constitutions and the judgment predicated upon that statute is, therefore, contrary to law.

Reversed with directions to sustain the appellant's motion for a new trial and for further proceedings

NOTES

(1) In a footnote to the opinion in *Pavlis v. Atlas-Imperial Diesel Engine Co.*, 121 Fla. 185, 189, 163 So. 515 (1935), an action in replevin, the court said: "For the information and guidance of the bench and bar the verdict and judgment in this case is reproduced as an appropriate one to be used in cases like this:

"We, the jury, find for the plaintiff, Atlas-Imperial Diesel Engine Company, and against the defendant, Nikitas Pavlis.

"We further find that the plaintiff, Atlas-Imperial Diesel Engine Company, is now and was at the time of the institution of this suit, to-wit, on the 11th day of April, 1930, the owner of and entitled to the immediate possession of that certain personal property described as follows, to-wit: "One 3-cylinder 30 H.P. Four Cycle, Solid Injection, Atlas-Imperial Marine Diesel Engine 6½" bore x 8½" stroke at 475 R. P. H. (sic), together with all equipment," and as described in the declaration.

"We further find that the value of the above described personal property is the sum of \$2,500.00.

"We further find that the amount of the special interest of the plaintiff and to the above described personal property is the sum of \$3,623.62⁴ principal and \$375.00 interest, making a total of \$3,998.62.

"We further find that the above described property was redelivered to the defendant upon a forthcoming bond upon which H. W. Snell and Nick Georgiades were his sureties.

"So say we all.

"Feb. 28th, 1934.

"W. A. MOREE, Foreman."

⁴ Plaintiff sold the engine to defendant, retaining the title thereto to secure the payment of the purchase price. Defendant still owed plaintiff \$3,623.62 on account of the price.

"It is, thereupon, *ordered and adjudged* that the plaintiff, Atlas-Imperial Diesel Engine Company, a corporation, do have and recover of and from the defendant, Nikitas Pavlis, the immediate possession of said personal property described in the verdict, to-wit: One 3 cylinder, 30 H. P. Four Cycle, Solid Injection, Atlas Imperial Marine Diesel Engine 6½" bore x 8½" stroke at 475 R. P. M., together with all equipment, as described in the declaration.

"It is further *ordered and adjudged* that the plaintiff, Atlas-Imperial Diesel Engine Company, a corporation, do have and recover of and from the defendant, Nikitas Pavlis, and his sureties, to-wit: H. W. Snell and Nick Georgiades, the value of the plaintiff's special interest, to-wit: Three Thousand Nine Hundred Ninety-eight and 62/100 Dollars (\$3,998.62)⁵ together with its costs in this behalf expended amounting to \$44.05, for all of which let execution issue to be levied on the goods and chattels, lands and tenements of the said defendant and sureties on the bond of the said defendant and to said plaintiff rendered."

(2) *Charlotte Barber Supply Co. v. Branham*, 184 S. C. 184, 191 S. E. 891 (1937): Action of claim and delivery for the recovery of certain chairs and other equipment for a barber shop to the possession of which plaintiff claimed to be entitled because of defendant's breach of the conditional sale contract by which plaintiff had sold them to defendant. There was some evidence at the trial that their then value was about \$850. The trial judge directed a verdict for plaintiff but submitted the question of the value of the property to the jury, which returned the following verdict: "We find for the plaintiff the possession of the property . . . , and in case possession cannot be had; then for its value, to wit: Two Hundred Dollars." Defendant then offered to pay the value of the property as found by the jury, and moved that upon such payment the lien of the conditional sale contract on the property be discharged and his bondsmen be released. Plaintiff, on the other hand, moved for an order directing defendant to deliver the property to plaintiff. The judge, holding that defendant "had the right to pay the value found by the jury only in the event such property had been destroyed or irremediably lost so that its possession could not be had," denied defendant's motion and granted plaintiff's motion. *Affirmed*. "In actions of claim and delivery . . . , the first object . . . is to protect the rights of the true owner in obtaining possession of his property in specie, if practicable." He therefore has the right and should be given the opportunity to exhaust every lawful means to locate and gain possession of his property before being required to accept its value as found by the jury. Defendant "overlooks the vital point that he may pay the value only in the event possession of the property cannot be had."⁶

(3) In *Charlotte Barber Supply Co. v. Branham*, *supra* Note (2), judgment on the verdict was rendered for plaintiff on Oct.

⁵ With respect to this part of the judgment the court said (121 Fla. 190, 163 So. 515, fn.): "As will appear by reference to the opinion, however, the amount of the judgment above entered should have been limited to \$2,500.00, the *found* value of the property and not for the value of the special interest when the value of such special interest exceeds the ascertained value of the replevied property."

⁶ *Cf. Adams v. McMickle*, 176 Or. 459, 158 P. 2d 648 (1945).

28, 1936, and on the night of that day all of the articles "disappeared" from defendant's barber shop. On Oct. 29 execution was issued on the judgment but the sheriff returned that the property could not be found at defendant's shop and that defendant disclaimed knowledge of its whereabouts. On Nov. 2 a second execution was issued with like result. Plaintiff then moved that defendant be adjudged in contempt but the motion was dismissed as premature because defendant had not previously been examined in supplementary proceedings. Plaintiff then examined defendant in supplementary proceedings and he testified that the property was taken from his shop on Oct. 28 and that he did not have it or know where it was. Plaintiff then obtained the appointment of a receiver of the property whom the court directed to secure possession of it. Thereafter, in consequence of a report by the receiver, the court issued a rule requiring defendant to show cause why he should not disclose the whereabouts of and immediately deliver the property to plaintiff and, if he failed to do so, be adjudged in contempt. However, this rule and the order appointing the receiver were subsequently vacated because plaintiff had appealed before they were issued, thus depriving the court of jurisdiction of the matter. Apparently, plaintiff then instituted an action against defendant and his sureties, charging them with a fraudulent conspiracy to conceal the property in an effort to force plaintiff to accept its value as fixed by the jury. Apparently, too, this action was pending when defendant's appeal (see Note (2) *supra*) was heard.

(4) *Universal Credit Co. v. Antonsen*, 374 Ill. 194, 198-9, 29 N. E. 2d 96 (1940): Plaintiff brought an action of replevin in the Municipal Court to recover 14 automobiles. A writ of replevin issued but defendant refused to deliver them to the bailiff or to disclose their whereabouts. As a result he was adjudged guilty of contempt pursuant to a rule of the Municipal Court which provided in effect that if a bailiff cannot find the property described in such a writ and demands delivery of the defendant it shall be deemed a contempt of court for the defendant to fail to comply with the bailiff's demand. Judgment *reversed*. (i) "There is nothing in the Replevin act which demands that the defendant turn the property over to the officer under the replevin writ on pain of fine or jail sentence or both if he refuse or fail." Consequently, in "subjecting the defendant to contempt, the rule . . . provides to the plaintiff a remedy the Replevin act does not contemplate." The rule is therefore invalid because in conflict with the statute. (ii) "True, a defendant may defeat the purpose of the writ by secreting the property and refusing to turn it over to the officer. Nothing in the act prevents it. If such be a weakness in the act, it is a legislative and not a judicial question."⁷

(5) In *Maxham v. Day*, 16 Gray 213, 77 Am. Dec. 409 (Mass. 1860), the court held that a sheriff may not, and therefore need not, seize articles of dress or personal adornment in order to

⁷ Commented upon in 35 Ill. L. Rev. 988 (1941), in which it is pointed out that "several states have provided for the contempt remedy by statute." Cf. *Ex parte Irwin*, 320 Mo. 20, 6 S.W. 2d 597 (1928).

execute a writ of replevin if, when he attempts to execute it, defendant is wearing them. "The necessity of securing immunity to the person from unreasonable searches and seizures and the impolicy of allowing an unlimited power to an officer to take on civil process articles worn on the person, forbid the extension of the remedy of replevin to property so used and situated. A bill in equity for property unlawfully withheld affords an ample remedy to recover possession of property of such a nature."

(6) In *Broomfield v. Checkoway*, 310 Mass. 68, 38 N. E. 2d 563 (1941), it is said (at p. 69): "The common law authorities establish the proposition that an officer may break into a building such as that (a building in which machinery was stored) here involved, for the purpose of seizing a chattel upon a writ of replevin." Cf. *State v. Pope*, 4 Wash. 2d 394, 103 P. 2d 1089, 129 A. L. R. 240 (1940): Defendant defaulted in the payment of monthly installments of the price of a range and refrigerator which she had bought under a conditional sale contract. The seller thereupon brought an action against her for the return of the property or, in the alternative, its value, and made claim for the immediate delivery of the property by filing the affidavit and bond required for that purpose. The sheriff went to defendant's home in order to seize the property and rang the door bell. Defendant opened the door partially, and the sheriff then introduced himself, explained his mission, served defendant with the summons, complaint, affidavit and bond, and asked defendant whether she had the range and refrigerator in her possession. Upon receiving an affirmative answer, he told defendant that it was "his unpleasant duty" to remove them. Thereupon defendant started to close the door but the sheriff held it ajar with his foot and by the force of his weight pushed it open and entered against her resistance. Defendant ordered him to leave and tried to eject him but, failing in that, she resorted to blows and abusive language. The sheriff protected himself as best he could and proceeded to the kitchen where he found the range and refrigerator. It took him thirty minutes with the aid of two assistants to remove them and during this period defendant continued to attack him in spite of his threat to arrest her, which, at the conclusion of his job, he did. She was convicted of the crime of resisting a public officer engaged in the performance of a legal duty, and appealed on the ground that it was unlawful for the sheriff to enter her home forcibly and that she was therefore justified in resisting him. The "Claim and Delivery" statute provided: "If the property, or any part thereof, be concealed in [a] building . . . the sheriff shall publicly demand its delivery. If it is not delivered, he shall cause the building . . . to be broken open, and take the property into his possession" (Rem. Rev. Stat. § 714) ⁸ Conviction *affirmed*, four judges dissenting.

(7) 4 Restatement, Torts § 946, comments *a* and *b* (1939): "The common-law action of replevin and its modern equivalents are unique in that the original or provisional process authorizes the sheriff to seize the goods in suit and deliver them to the

⁸ It appears from the report of this case that Indiana, North Carolina and Michigan have similar statutes.

plaintiff before trial. This makes the action, in design, an effective specific remedy, but certain practical difficulties often prevent it from so functioning. The goods must be found before they can be seized. Nowhere is it a contempt for the defendant merely to refuse to aid the sheriff. Even if his active concealment of the goods from the officer is a contempt, the difficulties of proof make a contempt proceeding ineffective. Moreover, when the location of the goods is ascertained, whether by discovery or otherwise, their seizure may be obstructed by rules of law which forbid molestation of the defendant's person, breaking of outer doors, and similar rules. Finally, if the officer succeeded in taking the goods, statutes usually give the defendant the privilege of regaining possession upon giving bond.

"In almost any case, the probability that the action would successfully function as a specific remedy for the recovery of a chattel is so slight that the remedy should be appraised in its alternative character as a damage remedy, for the purpose of applying the adequacy test. So considered, its adequacy is affected by the fact that the measure of damages is the value of the chattel plus damages for detention or by the fact that seizure of the goods and their release on bond gives the plaintiff security for the collection of the damages."

PROBLEM

For what purpose is the "adequacy test," referred to in Note (7) *supra*, applied?

DUKE OF SOMERSET v. COOKSON

Court of Chancery, 1735. 3 Peere Williams 390.

The duke of Somerset, as lord of the manor of Corbridge, in Northumberland, (part of the estate of the Piercys late earls of Northumberland) was intitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His grace became intitled to it as treasure trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the duke's claim thereto. The duke brought a bill in equity to compel the delivery of this altar-piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of *trover* or *detinue*, and ought not to bring his bill in equity; that it was true, for writings savouring of the realty a bill would lie, but not for any thing merely personal; any more than it would for an horse or a cow. So, a bill might lie for an heir-loom; as in the case of *Pusey versus Pusey*, 1 Vern. 273. And though in *trover* the plaintiff could have only damages, yet in *detinue* the thing itself, if it can be found, is to be recovered; and if such bills as the

present were to be allowed, half the actions of *trover* would be turned into bills in chancery.

On the other side it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *volens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be over-ruled, and it was over-ruled accordingly.

NOTE

Broomfield v. Checkoway, 310 Mass. 68, 38 N. E. 2d 563 (1941): Plaintiff's bill, described as one for "equitable replevin," alleged and the judge found that defendant prevented plaintiff from removing certain machinery belonging to plaintiff from a building which was owned by defendant and in which the machinery was stored, by locking and barring the entrance to the building. Mass. G. L. (Ter. Ed. 1932) c. 214, § 3 (1), gives courts of equity jurisdiction over "suits to compel the re-delivery of goods or chattels taken or detained from the owner, and so secreted or withheld that they cannot be replevied." Defendant demurred to the bill on the ground that it did not state a cause of action under this statute because "an officer armed with a writ of replevin would have a right forcibly to remove the locks and bars and to seize the machinery." Demurrer overruled and decree rendered ordering defendant to deliver the machinery to plaintiff. *Affirmed*. Within the meaning of the statute, chattels are "so secreted or withheld that they cannot be replevied," if there is "a probable inability as a practical matter to obtain relief by replevin." While "an officer may break into a building, such as that here involved, for the purpose of seizing a chattel upon a writ of replevin," the attempt to do so is attended by "uncertainty and danger" which "present a case within the statute."

SUTTON, PERSONAL ACTIONS AT COMMON LAW

1929. 20-21, 52-56.*

So, too, there was a writ by which a person who was entitled to a term of years and was wrongfully deprived of his term, could bring an action, called an action of ejectment,¹ against the person who had dispossessed him, who would accordingly be attached to show

"wherefore with force and arms he entered into one messuage with the appurtenances thereof in . . . which X. Y. hath demised to the aforesaid A. B. for a term which is not yet expired and ejected him from his said farm" (*firma*) "and other enormities to him did to the great damage of the said A. B. and against our peace."

This was the genuine action of ejectment upon which the fictitious action, of which more hereafter, was founded. . . .

From the perusal of the original writ in this action we have learnt that, properly speaking, it was the remedy of a person who had been wrongfully deprived of a term of years and was not appropriate to the case of a man who had been ousted from his fee, to recover which, in strictness, he had to bring a real action.² Owing to the intricacies of the latter proceeding and the innumerable devices by which the defendant could obstruct the plaintiff, a real action was avoided if the plaintiff had any other remedy, and in this instance a fictitious action was invented to help him. The idea was hit upon that he should grant a lease of the property in question to some friend who would then enter upon the land and, by arrangement, would be ejected therefrom by some other friend who was to be made the defen-

* By permission of Butterworth & Co. (Publishers) Ltd.

¹ For a history of the action of ejectment, "the manner of its process, and the principles whereon it is grounded," see 3 Blackstone, Commentaries, * 198-208 (Lewis' ed. 1929). For the history of the development of the action, see also Maitland, *The Forms of Action at Common Law*, 47-48, 53-61 (1941); Martin, *Civil Procedure at Common Law*, 359-364 (1905); 7 Holdsworth, *A History of English Law*, 4-23 (3d ed. 1927).

² Cf. Sutton, *op. cit. supra*, at 2-3: "[The real actions] were extremely intricate and rather dilatory, and although at one time they were the most frequent and important of the actions which came before the Courts, they were falling into disuse as early as the reign of Edward III. Other means, notably the fictitious action of ejectment, were devised of effecting most of the objects for which they were designed: and consequently, though apparently there were some sixty of them, with the exception perhaps of *quare impedit*, by which the title to an advowson was tried, it is but rarely that we come across one in the more modern Common Pleas reports—and still more rarely that we have any occasion to refer to one; and with but three exceptions they were all abolished by section 36 of 3 & 4 Will. 4, c. 27, and it would be no mean feat to read that section aloud at sight without making any mistake in the pronunciation of the names by which they were known." For the nature and the history of the development of these actions, see 3 Blackstone, *op. cit. supra* note 1, at * 167-197; Maitland, *op. cit. supra* note 1, at 21-35, 41-46; Martin, *op. cit. supra* note 1, at 104-139.

dant in the action. At one time, therefore, the lessee and the ejector were real people, but this act in the comedy was later dispensed with and both the lessee and the casual ejector (as he was called) existed only in imagination and were usually called "John Doe and Richard Roe." What would happen then was that without the issue of the original writ (for, as Richard Roe did not exist, it was impossible to attach him), a declaration in the following terms would be drawn up:

Richard Roe was attached to answer John Doe wherefore with force and arms he entered into one messuage with appurtenances in ——— in the County of ——— which A.B. (the person who was claiming the title to the land and therefore the real plaintiff) demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm and other enormities to him did to the great damage of the said John Doe and against the peace of the Lord the King. And thereupon the said John Doe by his attorney complains that whereas the said A.B. on the ——— day of ——— aforesaid had demised to the said John Doe the tenement aforesaid with the appurtenances to have and to hold the said tenement with the appurtenances to the said John Doe and his assigns from the ——— day of ——— then last past to the end and term for five years from thence next following and fully to be completely ended, by virtue of which demise the said John Doe entered into the said tenement with the appurtenances and was thereof possessed, and the said John Doe being so possessed thereof, the said Richard Roe afterwards, that is to say, on the said ——— day of ——— with force and arms, that is to say, with swords staves and knives, entered into the said tenement with the appurtenances which the said A.B. demised to the said John Doe for the term aforesaid which is not yet expired, and ejected the said John Doe out of his said farm and other enormities to him did, to the great damage of the said John Doe and against the peace of the said Lord the King, whereby the said John Doe saith that he is injured and damaged to the value of ——— pounds, and therefore he brings his suit, etc.

The Lease. The Entry. The Ouster.

This document was then served on the real defendant under cover of the following letter:

"Mr. C. D. (the real defendant),

"I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of eject-

ment or to some part thereof: and I, being sued in this action as casual ejector and having no claim or title to the same, do advise you to appear next term in His Majesty's Court of King's Bench at Westminster by some attorney of that Court, and then and there by a rule to be made of the said Court, to cause yourself to be made Defendant in my stead, otherwise I shall suffer judgment to be entered against me and you will be turned out of possession.

"Your loving friend,

"Richard Roe."

Thereupon Mr. C. D. would follow this good advice and an order of the Court would be made to the effect that:

"By the assent of both parties and their attorneys, C. D. may be made Defendant in the place of the now Defendant Richard Roe, and shall immediately appear to the Plaintiff's action and shall receive a declaration in a plea of trespass and ejectment of the tenement in question, and shall immediately plead not guilty, and upon the trial of the issue shall confess lease, entry and ouster, and insist upon his title only."³

Thereupon another declaration was framed in exactly the same terms as that set out above, with the exception that the name of the real defendant was inserted in the place of Richard Roe, and was duly served on him and he thereupon entered a plea of "not guilty" and the case went to trial.

When reading an old case of ejectment, you can, if you wish to disembarass your mind of the fiction, get at the real parties in the following way. The action is usually entitled "Doe, Lessee of A.B. v. C.D." or "Doe dem." (i.e. on the demise of) "A.B. v. C.D.," so to get at the name of the real plaintiff, strike out the words "Doe, Lessee of," or "Doe dem." . . .

Such was the fictitious action of ejectment by means of which the title to land was tried. It is easy, no doubt, to make merry over it, and numerous people have done so, for, to quote the words of a not very famous poet

"Since ever man, through Adam's lapse condemned to
dreary labour,
Found recreation from his toil in laughing at his neighbour,
The drolls of every race and age, with humorous accord,
Upon the lawyer's hapless head their ridicule have
poured;"

³ This was known as the common consent rule. See *Doe dem. Greaves v. Raby*, 2 B. & Ald. 948, 109 Eng. Rep. 1395 (K. B. 1831). Cf. *Fairclaim ex demiss' Fowler v. Sham-Title*, 3 Burr. 1290, 97 Eng. Rep. 837 (K. B. 1762).

and probably, so far as this country is concerned, their choicest gems have been reserved for the relentless persecution of the unhappy John Doe by that bloodthirsty villain, Richard Roe, and if we are so minded, we may denounce the whole proceeding as childish make-believe and solemn fooling. But before we do so, let us look at home. During the war a certain measure was introduced which, owing to the general approval with which it was received, has been continued since, with the result that in pursuance of the provisions of a Statute in that case made and provided, we all of us on a Sunday in April put forward our watches by one hour, and for the next five months pretend that we have not done so. An inhabitant of Mars might wax extremely facetious about this, and our only answer to his sallies would be that, human nature on earth being what it is, this was the best method of effecting a desirable object, for had we been ordered to get up and go to bed an hour earlier, we should, in order to show our independence, have got up and gone to bed rather later than usual. In other words, fictions have their uses, and if they produce beneficial results, there is no reason why we should not use them. Perhaps, therefore, we shall, on reconsideration, somewhat modify our superior scorn of our ancestors for devising this means, comparatively cheap and expeditious (for nothing in law is really cheap and expeditious) of trying a title to land instead of compelling the plaintiff to resort to a real action with its intolerable intricacies and delays, and consequential expense.

NOTE ON EJECTMENT

While at present, as we shall see, there is only one form of civil action and facts rather than fictions must be pleaded in most of the United States, an action to recover the possession of real property still goes by the name of ejectment; and the principal characteristics of the action, other than the mode of pleading, are on the whole the same as those of its common law forbear.

(1) The action may be maintained only if it involves real property which is corporeal rather than incorporeal, that is, land or things such as growing crops so attached thereto as in legal contemplation to partake of its nature.¹ Accordingly, the action will not lie to recover intangible property, such as an easement, although real,² or personal property, although tangible. This condition of maintaining the action is often expressed

¹ *Murphy v. Bolger*, 60 Vt. 723, 15 A. 365, 1 L.R.A. 309 (1888); *Nichols v. Lewis*, 15 Conn. 137 (1842); Note, 116 Am. St. Rep. 568 (1907).

² *Smith v. Wiggins*, 48 N.H. 105 (1868); *Lessee of Black v. Hepburne*, 2 Yeates 331 (Pa. 1798).

by saying that it lies only to recover real property upon which an entry can actually be made or of which a sheriff can deliver possession.

(2) Ejectment continues to be regarded as an action at law. Hence, it is still generally the case that only one who has a *legal* right to the immediate possession of the property which he seeks to recover can maintain the action and that in ejectment a legal title will prevail over an equitable one.³

(3) It is still said that in ejectment a plaintiff must recover upon the strength of his own title rather than upon the weakness of the defendant's, but this condition of maintaining the action has been judicially interpreted somewhat differently from, and with greater uniformity than, the like condition of maintaining replevin.⁴ In order to understand how most courts have construed it, we must realize that the possession of real property has both legal and evidential significance and that its protection has been a special concern of the courts; and we must distinguish between cases in which plaintiffs in ejectment have, and those in which they have not, been dispossessed by the defendants.

By the great weight of authority, a plaintiff who has been ousted from possession by a "mere intruder"⁵ is entitled to regain it in ejectment, even though he may have acquired it wrongfully.⁶ This is either on the theory that possession is itself a species of title and, although the lowest species, better than no title at all,⁷ or on the theory that it creates a presumption of title which the defendant cannot rebut because, by hypothesis, he cannot establish that he himself has any title whatever and because he is not permitted to take advantage of the

³ *Lincoln v. French*, 105 U.S. 614, 26 L. Ed. 1189 (1882); *Taylor v. Russell*, 65 W. Va. 632, 64 S.E. 923 (1909); *Laurisinni v. Doe ex dem. Corquette*, 25 Miss. 177, 57 Am. Dec. 200 (1852). Cf. *Kingsnorth v. Baker*, 213 Mich. 294, 182 N.W. 108 (1921).

⁴ See *Philbrick, Seisin and Possession as the Basis of Legal Title*, 24 Iowa L. Rev. 268, 277 *et seq.* (1939); *Wiren, The Plea of the Ius Tertii in Ejectment*, 41 L. Q. Rev. 139 (1925).

⁵ As to who is a "mere intruder" or a "mere trespasser," see *Tapia v. Williams*, 172 Ala. 18, 54 So. 613 (1911).

⁶ See *Doe ex dem. Hughes v. Dyball*, 3 C. & P. 610 (1829); *Sowder v. McMillan's Heirs*, 4 Dana 456 (Ky. 1836); *Bradshaw v. Ashley*, 180 U.S. 59, 21 S. Ct. 297, 45 L. Ed. 423 (1901); *Bates v. Campbell*, 25 Wis. 613 (1870); *Tapia v. Williams*, *supra* note 5; *Asher v. Whitlock*, L.R. 1 Q.B. 1 (1843); *Jackson ex dem. Murray v. Hazen*, 2 Johns. 22 (N.Y. Sup. Ct. 1806); *Casey v. Kimmel*, 181 Ill. 154, 54 N.E. 905 (1899); *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338 (N.Y. Sup. Ct. 1813). But see *Cahill v. Cahill*, 75 Conn. 522, 54 A. 201, 60 L.R.A. 706 (1903).

⁷ Cf. *Bates v. Campbell*, *supra* note 6, at 616: "But it has always been held that bare possession constitutes the first degree of title"; *Philbrick, op. cit. supra* note 4, at 279: "Possession is a fact, but its mere existence engenders a right, a possessory title, a right to retain or regain the property from any one who has no better right to hold it."

ius tertii, that is, to show that one who is legally a stranger to him has title.⁸ If, however, the defendant is not a mere trespasser, if he entered upon property peaceably and in good faith, under claim of right or color of title, a concession is made to him for the purpose, as it is said, of protecting *his* possession: He may rebut the presumption of title in the plaintiff by establishing a title either in himself or in a stranger⁹ and, if he succeeds in doing so, the plaintiff can no longer rely solely upon his prior possession. He must now prove that he has a right to possession which is superior to that of the defendant or of the stranger, as the case may be. And, of course, that is the plaintiff's predicament in all cases in which he has not been dispossessed by the defendant, for in such cases there is no presumption of title operating in his favor.¹⁰ In all such cases, therefore, he must in the first instance introduce evidence to establish that he is entitled to immediate possession of the property.

BUTLER v. THE FRONTIER TELEPHONE CO.

Court of Appeals of New York, 1906.
186 N.Y. 486, 79 N.E. 716, 116 Am.St.Rep. 563, 11 L.R.A.,N.S., 920.

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

This is an action of ejectment, which was tried by consent before the court without a jury. The trial judge found as facts that "the defendant on or about January 1, 1903, without the consent of the plaintiff and without lawful authority, entered upon" his premises in the city of Buffalo "and stretched a wire over and across the same in the manner described in the complaint and maintained said wire upon said premises until January 10, 1903, when the defendant removed the said wire entirely from plaintiff's said premises."

According to the allegations of the complaint the wire was strung "about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side," reached "across the entire width of said premises."

⁸ See *Sowder v. McMillan's Heirs*, *supra* note 6; *Bradshaw v. Ashley*, *supra* note 6; *Tapia v. Williams*, *supra* note 5; *Casey v. Kimmel*, *supra* note 6; Note, 28 Mich. L. Rev. 184 (1929).

⁹ Note, 28 Mich. L. Rev. 184 (1929). See *Tapia v. Williams*, *supra* note 5.

¹⁰ See *Goodtitle dem. Parker v. Baldwin*, 11 East 488 (K.B. 1809); *Sowder v. McMillan's Heirs*, *supra* note 6; *Colston v. M'Vay*, 1 A. K. Marsh. 250 (Ky. 1818).

The trial judge further found that "the plaintiff has been in possession of the premises described in the complaint at all times mentioned therein and since, except that portion thereof occupied by the defendant with said wire during the period specified." The damages sustained by the plaintiff were assessed at six cents for "the withholding by the defendant of that portion of the premises occupied by said wire for the period above specified." There was neither allegation nor evidence that the wire was supported by any structure standing upon the plaintiff's lot. The action was commenced on the 5th of January, 1903.

The court found as a conclusion of law that the plaintiff, as the owner in fee of the premises in question, "was entitled at the commencement of this action to have said wire removed from said premises, and is entitled to judgment against the defendant so declaring, and for six cents damages for withholding said property and for the costs of this action"

The judgment entered accordingly was affirmed on appeal to the Appellate Division by a divided vote, and the defendant now comes here. . . .

VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review. Questions similar but not identical, as they related to overhanging eaves, projecting cornices or leaning walls, were decided in favor of the defendant in *Aiken v. Benedict* (39 Barb., 400), and *Vrooman v. Jackson* (6 Hun, 326), and in favor of the plaintiff in *Sherry v. Freckling* (4 Duer, 452). In *Leprell v. Kleinschmidt* (112 N. Y. 364, 19 N. E. 812) the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other state, and upon the cognate question relating to projecting cornices and the like, the authorities are divided. . . .

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner, and disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy.

. . .

An action of ejectment, according to the Code, is "an action to recover the immediate possession of real property." (Code Civ. Pro. § 3343, sub. 20.) While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. (Code Civ. Pro. §§ 1496 to 1532¹; Real Property Law, §§ 1, 218; 2 R. S. 303.)

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises and that he was entitled to the immediate possession thereof as owner when the action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute, for it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder. (*Sullivan v. Le-graves*, 2 Str. Cases, 695; *Doe v. Burt*, 1 T. R. 701; *Lady Dacre's Case*, 1 Lev. 58; *Rowan v. Kelsey*, 18 Barb. 484; *Otis v. Smith*, 26 Mass. 293; *Gilliam v. Bird*, 8 Iredell [Law], 280; *Reynolds v. Cook*, 83 Va. 817, 3 S.E. 710; *McDowell v. King*, 4 Dana [Ky.], 67; *Adams on Ejectment*, 27; *Newell on Ejectment*, 38; *Warvelle on Ejectment*, 22.) Mines, quarries, mineral oil and an upper room in a house are familiar examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property"? What does the term include so far as the action of ejectment is concerned? The answer to these

¹ See N. Y. Civ. Prac. Act §§ 990 ff.

questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad coelum et ad inferos*. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. (Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th ed.] *401.) "*Usque ad coelum*" is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the sheriff

to deliver possession is a test of the right to maintain an action of ejectment. (*Jackson v. Buel*, 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N. Y. 382, 389; *Patch v. Keeler*, 27 Vt. 252, 255; Warvelle on Ejectment, 34; Crabb on Real Property, 710; Butler's Nisi Prius, 99.) "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." (*Nichols v. Lewis*, 15 Conn. 137.) The defendant insists that the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied there is no occasion for delivery, because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced. (*Wisner v. Ocumpaugh*, 71 N. Y. 113.)

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, WILLARD BARTLETT and CHASE, JJ., concur; O'BRIEN and HAIGHT, JJ., absent.

Judgment affirmed.²

² Cf. *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E.2d 575 (1942); *Vanderslice v. Shawn*, 27 A.2d 87 (Del. Ch. 1942).

SECTION 3. COMPENSATORY DAMAGES

McCORMICK, DAMAGES

1935. § 137.*

Occasionally in tort cases an award by way of punishment may be made, but normally in all kinds of cases the truism remains true that the primary aim in measuring damages is to arrive at *compensation*, no more and no less. In a case of tort—the breach of some duty which the law imposes on every one—the general purpose of compensation is to give a sum of money to the person wronged which, as nearly as possible, will restore him to the position he would be in if the wrong had not been committed. In the case of a breach of contract, the goal of compensation is not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled. This distinction finds frequent expression and application in the decisions, but of course these wide generalizations are not adequate formulas for placing before juries the standards of compensation nor for testing and regulating the amount of damages to be given for wrongs and breaches of contract. Other principles have been developed, which serve as limitations upon the extent of liability in these cases. Of these, the most constantly used are the principle which in contract cases restricts the damages to those which were in the “contemplation” of the parties when the contract was made, and the other principle, finding its chief employment in tort cases, which bars recovery for consequences not “proximately” caused by the defendant’s conduct. Both of these doctrines give effect to major policies governing the larger outlines of risk or liability which the courts are willing to impose for given conduct.

HADLEY v. BAXENDALE

Court of Exchequer, 1854. 9 Ex. 341, 156 Eng. Rep. 145.

[Plaintiffs, who operated a mill at Gloucester, sued defendants, who were common carriers, for damages for breach of a contract of carriage. The declaration contained two counts but prior to the trial plaintiffs entered a *nolle prosequi* as to the first. In the second count plaintiffs alleged that they were forced to shut their mill down because the crank shaft of the steam

* By permission of West Publishing Company, the publisher.

engine, by which their mill was operated, became broken; that they arranged with W. Joyce & Co., of Greenwich, the manufacturers of the engine, to make a new shaft from the pattern of the old one; that they delivered the broken shaft to defendants who, in consideration of the payment of their charges, promised to use due care to deliver it to W. Joyce & Co. within a reasonable time but that defendants failed to do so; that by reason of defendants' negligence the completion of the new shaft and the re-opening of plaintiffs' mill were delayed five days longer than would otherwise have been the case; and that during that period plaintiffs were compelled to pay wages and lost profits aggregating 300*l.*, for which amount plaintiffs sought judgment. Defendants pleaded that they had paid 25*l.* into court in satisfaction of plaintiffs' claim; plaintiffs replied that this sum was insufficient for that purpose; and issue was joined upon this replication.]

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2*l.* 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not

liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25*l.* damages beyond the amount paid into Court.

Whateley, [for defendants], in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection.

[The arguments of counsel are omitted. After they were completed the court took the case under consideration until the next term.]

The judgment of the Court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and, in *Blake v. Midland Railway Company*, 21 L. J., Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at *Nisi Prius*.

"There are certain established rules," this Court says, in *Alder v. Keighley*, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other

hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred;

and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.¹

PROBLEM

Do you think that in *Hadley v. Baxendale* the court applied the rule which it formulated correctly or incorrectly?

KRAUSS v. GREENBARG

Circuit Court of Appeals of the United States, Third Circuit, 1943.
137 F.2d 569.¹

GOODRICH, CIRCUIT JUDGE. On July 30, 1940, the defendants who used the business name of King Kard Overall Company, received an award and contract from the War Department of the United States to supply 698,084 pairs of leggings. The contract called for deliveries of certain quantities of leggings at stated intervals and provided for a sum as liquidated damages² for each day of delay. By a memorandum of the same date the defendants placed an order with the plaintiff, whose business was carried on under the name of American Cord and Webbing Company, for the webbing to be used in making the leggings. The order provided for certain quantities of webbing to be delivered at given dates.

On March 11, 1941, the webbing company started suit in the Eastern District of Pennsylvania to recover \$15,326.13 for the

¹ See McCormick, Damages, §§ 138-140 (1935). Cf. *Hajoca Corporation v. Security Trust Co.*, 41 Del. 514, 25 A. 2d 378 (1942).

² [All footnotes, except those in brackets, are the court's.]

² [Cf. McCormick, Damages, § 146 (1935): "Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable as agreed damages if the breach occurs." See *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. — (1947).]

webbing sold and delivered to the overall company pursuant to the latter's order. The buyers admitted nonpayment but filed a counterclaim for \$22,740.99. The jury returned a verdict in favor of the overall company for the counterclaim and judgment was entered for the difference less \$2,000. (See footnote 17.) The webbing company filed this appeal.

The issues raised on this appeal concern the counterclaim. The theory of the counterclaim is that the webbing company did not maintain the scheduled deliveries of the webbing and as a result thereof the overall company could not meet its schedule with the Government. Because of this it incurred the per diem penalty provided for in the government contract for each day's delay in deliveries which amounted to \$22,740.99. These special damages it seeks to charge to the webbing company. The latter admits that it failed to deliver the webbing as per schedule. It denies, however, liability on its part for the special damages sought.

The first question for us is to determine the law applicable to the controversy. [The court decided that "the Pennsylvania rule of damages" was controlling.]

The rule governing special damages³ in contract cases applied in the Pennsylvania decisions has been that laid down in the leading English case of *Hadley v. Baxendale*, 9 Ex. 341 (1854). It is that special damages for breach of a contract are not recoverable unless they can fairly and reasonably be considered as arising naturally from the breach or as being within the contemplation of the parties, at the time the contract was made, as the probable result of the breach. See *Fleming v. Beck*, 1865, 48 Pa. 309; *Wolf v. Studebaker*, 1870, 65 Pa. 459; *Billmeyer, Dill & Co. v. Wagner*, 1879, 91 Pa. 92; *Raby, Incorporated v. Ward-Meehan Company*, 1918, 261 Pa. 468, 104 A. 750, all citing *Hadley v. Baxendale*.⁴ Where the consequential damages claimed were within the contemplation of the parties at the time of the contracting as the probable result of the breach, their recovery has been allowed. *Pittsburg Coal Co. v. Foster*, 1869, 59 Pa. 365; *Wolstenholme, Inc. v. Jos. Randall & Bro., Inc.*, 1929, 295 Pa. 131, 144 A. 909; *F. P. Weaver Coal Co. v. Maryland Casualty*

³ [Cf. *McCormick, op. cit. supra* note 2, at 32, n. 3: "[A]pplying the rule in *Hadley v. Baxendale* . . . it is often said that notice need not be given of the risk of 'general' damage (meaning such usual losses as ordinarily flow from such a transaction), whereas notice must be given when the contract is made, if liability is to attach for other 'special' damage. . . . Here the terms 'general' and 'special' damage refer to the foreseeability of the harm, viewed as of the time of the contract. . . ."]

⁴ *Adams Express Company v. Egbert*, 1860, 36 Pa. 360, 78 Am. Dec. 382, is the Pennsylvania equivalent of *Hadley v. Baxendale*. Apparently decided without reference to the English case which preceded it by 6 years, it anticipates its rule in making foreseeability the criterion of recovery of special damages.

Co., 1929, 295 Pa. 456, 145 A. 595; *Stevenson v. Smith*, 1924, 82 Pa. Super. 539; *Siegel v. Struble Brothers, Inc.*, 1942, 150 Pa. Super. 343, 28 A. 2d 352. The question stressed as ultimately determinative in all these cases is whether at the time of making the contract the party who broke his promise knew that his breach would probably result in the kind of special damages claimed and thus could be said to have foreseen them. If he did, then he was liable for the consequential damages.

On this question in the case at bar we have a special finding by the jury. At the trial of the case the court submitted three questions to the jury. One asked whether Krauss (the webbing company) knew, at the time he made his contract with Greenbarg (the overall company), that the latter's contract with the Government provided that delay in delivery would subject it to a penalty. The jury answered yes. This finding, which is unassailed, establishes definitely that the webbing company knew and could have foreseen that if the webbing, which it undertook to furnish, was not delivered as scheduled in the contract and as a result the leggings could not be delivered on time, the overall company would incur the special damages it now claims. . . .⁵

Causation

The webbing company asserted at the trial, and introduced evidence tending to prove that its delay in furnishing webbing was not the sole cause for the overall company's delay in performance. It claimed as other contributing causes a landlord's distress and eviction at the buyer's factory, a removal by the overall company of its plant, a shortage of eyelets necessary to the manufacture of the leggings, and excessive delay by the manufacturer even after all the webbing had been delivered. Assigned as error, in view of this evidence, is the judge's charge to the jury that although there may have been other contributing causes, if the "primary" "real" "main" "chief" cause of the overall company's delay was the webbing company's failure to deliver on time, then the loss was chargeable to it. That delay,

⁵ [At this point the court rejected plaintiff's contention that to impose liability for harm as "special damages," there must have been "virtually a tacit agreement to assume the risk of whatever harm was foreseeable," although *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 23 S. Ct. 754, 47 L. Ed. 1171 (1903), "is some judicial authority for this view," because that view has not been adopted in Pennsylvania. Plaintiff also contended, as part of his "argument as to foreseeable consequences," that defendants were not entitled to recover on their counterclaim because they had failed to prove that at the time the contract was made he knew that they could not procure the webbing elsewhere in the event of his failure to deliver it. The court rejected this contention chiefly because "the judge charged the jury fully and . . . correctly regarding the rule of foreseeable consequences in recovery of special damages," and plaintiff failed to request more specific instructions.]

he charged had "to be sufficient in itself to have delayed his [overall company's] contract with the Government."⁶ It is contended that in order to charge the penalty to the webbing company, its failure to deliver on time had to be the sole cause of the damage claimed.⁷

We think the trial judge's charge was not open to attack by the appellant. One of the legal tests which must be met in order for something which is a cause in fact to be a "legal cause" is that it shall have been a substantial factor in bringing about the harm. As thus used substantial denotes "the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause," ⁸ If a number of factors are operating one may so predominate in bringing about the harm as to make the effect produced by others so negligible that they cannot be considered substantial factors and hence legal causes of the harm produced. In that event liability attaches, the requisites of legal cause being shown, only to the one responsible for the predominating, or substantial, factor producing the harm.⁹ The trial judge in charging the jury, required no less than this. As he himself says in the opinion on the motion for new trial, the charge in this respect may have been more favorable than the seller of the webbing was entitled to have. In any event, it is not open to attack by the latter.

Avoidable Consequences ¹⁰

Finally the webbing company argues that its opponent could have avoided the imposition of penalties and having failed to do so it cannot recover them as damages in this suit.

The webbing company did not itself manufacture the webbing it sold, but had ordered it from a mill. The cause of its

⁶ The jury specifically found that the penalty incurred by the manufacturer was a loss directly and naturally resulting, as above defined by the trial judge, from the webbing company's failure to deliver on time. The finding itself is not assailed.

⁷ It is to be noted that counsel for the overall company agreed to remit \$2,000 of the verdict for that portion of the penalty attributable to defective merchandise and late delivery during the two months period following the last delivery of webbing, allowing a reasonable time for using the webbing delivered.

⁸ 2 Restatement, Torts (1934) § 431, comment a. This problem is the same in tort and contract, though liability for consequences of an act is often carried further in instances where the defendant's liability is based on a tortious act. See 15 Am. Jur., Damages (1938) § 18; *Pennsylvania Railroad Company v. Aspell*, 1854, 23 Pa. 147, 151, 62 Am. Dec. 323.

⁹ See 2 Restatement, Torts (1934) §§ 431, 432, 433. The Pennsylvania cases are in accord. See Restatement, Torts; Penna. Annot. (1938) §§ 431, 432, 433.

¹⁰ [Cf. McCormick, *op. cit.* *supra* note 2, at 127: "Where one person has committed a tort, a breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for an item of damage which could thus have been avoided."]

inability to deliver, it says, was a breakdown of the weaving machinery at that mill and the inability of the mill to replace immediately the parts needed. This was communicated to the overall company. It is urged that under Article 17 of the government contract, the overall company could have procured an extension of time for its performance had it applied to the Government, and stated these facts. Article 17 of that contract provides: "That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes . . . , if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof, The contracting officer shall then ascertain the facts and extent of the delay and extend the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within 30 days, by the contractor to the head of the department . . . , whose decision on such appeal as to the facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto." Admittedly defendants failed to ask for an extension of time in writing. At the trial one of them testified that an application for an extension of time due to the foregoing circumstances would have been denied. The trial judge held that as a matter of law the cause of delay was not such as to entitle the overall company to an extension of time under Article 17 and that therefore the failure to request an extension of time was of no consequence. We think that this was a proper construction of the clause.

The Pennsylvania decisions support the general rule that a party to a contract cannot recover for damages which he could have avoided by reasonable means. *Pennsylvania Railroad Company v. Titusville & Pithole Plank Road Company*, 1872, 71 Pa. 350; *Henry Shenk Company v. Erie County*, 1935, 319 Pa. 100, 178 A. 662. But one is not required to go through the motions of attempting to avoid damages when it is certain that they will prove of no avail. That was the case here¹¹

¹¹ [The court's discussion of "federal court decisions and recent administrative rulings" is omitted.]

It seems clear in the light of these decisions that if a government contractor asked for an extension of time due to a breakdown of his machinery, not attributable to the causes specified or anything similar thereto, he could not obtain it because part of the ability to perform, which is the contractor's undertaking, is to have available machinery and replacement parts so that performance will not be delayed due to machinery breakdown. That is the very thing he undertakes to do when he agrees to perform within a given time. A fortiori he cannot be excused by way of an extension of time when the delay for such reasons is that of a subcontractor's vendor. The trial judge's instruction to the jury to this effect was correct.

The judgment of the District Court is affirmed.

NOTE

Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 Col.L.Rev. 335, 342 (1924): "The rule of Hadley v. Baxendale is an attempt to restrict the promisor's liability for breach of promise to those consequences, the risk of which he knew about, or must be taken to have known about, when he made the contract. The scope of damage for breach of contract is much narrower than the 'proximate consequence' rule which prevails in actions to recover for a tort. If we may assume that the defaulting promisor is usually an *entrepreneur*, a business man who has undertaken a risky enterprise, the law here manifests a policy to encourage the *entrepreneur* by reducing the extent of his risk below that amount of damage which, it might be plausibly argued, the promisee has actually been caused to suffer."¹²

VIRGINIAN RY. CO. v. ARMENTROUT

Circuit Court of Appeals of the United States, Fourth Circuit, 1946.
158 F.2d 358.

SOPER, CIRCUIT JUDGE. This case presents the account of an extraordinary accident to a 13 month old baby who strayed from his parent's house to a railroad track 289 feet distant, and was there run over by a passing engine, losing his left arm above the elbow and his right arm above the wrist. Two issues of negligence on the part of the railroad were submitted to the jury: (1) that the engineer failed to give adequate warning of the approach of the engine and (2) that he failed to keep an adequate lookout and to save the child from injury after his presence on the track was observed and there was still time to

¹² Cf. McCormick, *op. cit. supra* note 2, at 566-567: The effect of the well-nigh universal acceptance of the principle of Hadley v. Baxendale, "by subjecting all contract claims to a test of foreseeability by the contract breaker of the loss at the time of the making of the contract, diminishes the risk of business enterprise, and the result harmonized well with the free trade economic philosophy of the Victorian era during which our law of contracts became systematized."

stop the engine. The jury found a verdict for the plaintiff in the sum of \$100,000, and the Railroad Company appealed, alleging that the judge erred in his instructions to the jury and in his refusal to set aside the verdict as excessive.

The evidence in support of the verdict may be summarized as follows: The accident happened in the morning of May 27, 1944. A few minutes before the event, the child was playing in the yard while various members of the family were in a nearby field and in the house which was located on a hill above the railroad track by the side of a public road. The baby wandered down the hill unobserved. When next seen he was in a crawling position on the track at or near the crossing, where boards with composition paving between had been placed. He was a very active and intelligent child. He started to walk at the age of 9½ months and to talk soon afterwards. On several prior occasions when he was close to the crossing in the care of an elder brother he would scream and try to pull away and go back home if an approaching train blew its whistle as it neared the crossing.

. . . The evidence is conflicting as to the giving of signals by whistle and by bell as the engine neared the crossing, but a number of witnesses testified on behalf of the plaintiff that no signals of any kind were then given. All the witnesses, however, agreed that the engine made a loud noise as it approached, which could be heard a long way off. . . .

We consider first the contention that the judge erred in charging the jury that the defendant was liable if the jury should find that the engineer failed to give the warning signals required by law, and should further find that this failure was the cause of the accident. There was evidence tending to show that the engineer failed to obey the provisions of Ch. 31, Art. 2, § 8 of the West Virginia Code which provides that a bell or whistle shall be sounded by an engineer or a fireman on a locomotive engine at a distance of at least 60 rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling for a time sufficient to give due notice of the approach of the train. This evidence was denied but an issue or fact was thereby raised. Hence there would have been no error in submitting it to the jury if it were decisive of the controversy; but the attack is directed to the succeeding part of the instruction wherein the jury were told that in order to fasten the liability on the defendant they must also find that the child was of sufficient mental capacity to understand the meaning of such signals so as to get off the track if they had been given. To this phase of the charge the defendant ob-

jects, and with good reason, upon the ground that it cannot be supposed that a child of 13 months would have had any understanding in the premises. It is argued that the child was unusually intelligent and on a number of occasions had manifested fear when the whistle of a passing train was blown; but these facts are so unsubstantial that they do not in the slightest way overcome the common knowledge that a baby of 13 months is not equipped with reasoning powers. The judge himself recognized the incapacity of the child, for he instructed the jury, correctly we think, that the child could not be guilty of contributory negligence or at fault in the eye of the law. [Citations omitted.]

The inconsistency of this instruction with that just mentioned needs no comment, for the incompetency which rendered the child incapable of contributory negligence would have rendered it unable to understand the statutory signals if they had been given. Indeed in the pending case the evidence of the engineer, the only witness of the child's actions before it was struck, shows that it was incapable both of contributory negligence and of the ability to care for its own safety, for not only did it crawl upon the railroad track but remained there motionless as the train came down upon it, although it must have seen the engine and heard the loud noise of its approach. For these reasons, it was error to submit to the jury the issue of negligence based on the failure of the engineer to give the signals. Liability could not be based on a failure to give signals since the failure was not the proximate cause of the injury. *Beyel v. Newport News & Mississippi Valley R. R.*, 34 W.Va. 538, 540, 12 S.E. 532; *Butcher v. West Virginia & Pittsburg R. Co.*, 37 W.Va. 180, 16 S.E. 457, 18 L.R.A. 519. . . .

The judgment of the District Court will be reversed and the case remanded for a new trial.¹

Reversed and remanded.²

PROBLEM

In what sense did the court use the phrase "proximate cause" in the *Armentrout* case, *supra* p. 47?

¹ Cf. *Verni v. Johnson*, 295 N.Y. 436, 68 N.E. 2d 431 (1946).

² See *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997, 999 (D. C. W. Va. 1947): "The first trial of this case resulted in a hung jury. At the second trial the jury returned a verdict in favor of the plaintiff in the amount of \$100,000. On appeal the Circuit Court of Appeals reversed the case and remanded it for a new trial. It was tried a third time and . . . the jury returned a verdict in favor of the plaintiff for \$160,000." The judge denied defendant's motion to set aside the verdict and for a new trial, but the Circuit Court of Appeals reversed the judgment on the ground, among others, that the damages awarded were excessive. S. C., 166 F.2d 400 (C.C.A. 4th 1948).

IN RE POLEMIS AND FURNESS, WITHY & CO.

Court of Appeal, 1921. [1921] 3 K.B. 560.

APPEAL from the judgment of Sankey, J. on an award in the form of a special case.

The owners of the Greek steamship *Thrasyvoulos* claimed to recover damages for the total loss of the steamship by fire.

By a charter party, dated February 21, 1917, Messrs. Polemis and Boyazides, the owners of the Greek steamship *Thrasyvoulos* (hereinafter called the owners), chartered the steamship to Furness, Withy & Co., Ltd. (hereinafter called the charterers).

The vessel by the directions of the charterers or their agents in or about the months of June and July, 1917, loaded at Nantes a part cargo of cement and general cargo for Casablanca, Morocco. She then proceeded to Lisbon and was loaded with further cargo, consisting of cases of benzine and/or petrol and iron for Casablanca and other ports on the Morocco coast. She arrived at Casablanca on July 17, and there discharged a portion of her cargo. The cargo was discharged by Arab workmen and winchmen from the shore supplied and sent on board by the charterers' agents. The cargo in No. 1 hold included a considerable quantity of cases of benzine or petrol which had suffered somewhat by handling and/or by rough weather on the voyage, so that there had been some leakage from the tins in the cases into the hold. On July 21 it had become necessary to shift from No. 1 lower hold a number of the cases of benzine which were required to be taken on by the ship to Safi, and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which, when filled, were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working. In consequence of the breakage of the cases there was a considerable amount of petrol vapour in the hold. In the course of heaving a sling of the cases from the hold the rope by which the sling was being raised or the sling itself came into contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold, and the fall was instantaneously followed by a rush of flames from the lower hold, and this resulted eventually in the total destruction of the ship.

The owners contended (so far as material) that the charterers were liable for the loss of the ship; that fire caused by negligence was not an excepted peril; and that the ship was in fact lost by the negligence of the stevedores, who were the charterers' servants, in letting the sling strike the board, knocking it into the hold, and thereby causing a spark which set fire to the petrol vapour and destroyed the ship.

The charterers contended that fire however caused was an excepted peril; that there was no negligence for which the charterers were responsible, inasmuch as to let a board fall into the hold of the ship could do no harm to the ship and therefore was not negligence toward the owners; and that the danger and/or damage were too remote—i.e., no reasonable man would have foreseen danger and/or damage of this kind resulting from the fall of the board.

The three arbitrators made the following findings of fact:—

“(a) That the ship was lost by fire.

“(b) That the fire arose from a spark igniting petrol vapour in the hold.

“(c) That the spark was caused by the falling board coming into contact with some substance in the hold.

“(d) That the fall of the board was caused by the negligence of the Arabs (other than the winchman) engaged in the work of discharging.

“(e) That the said Arabs were employed by the charterers or their agents the Cie. Transatlantique on behalf of the charterers, and that the said Arabs were the servants of the charterers.

“(f) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.

“(g) There was no evidence before us that the Arabs chosen were known or likely to be negligent.

“(h) That the damages sustained by the owners through the said accident amount to the sum of 196,165*l.* 1*s.* 11*d.* as shown in the second column of the schedule hereto.”

Subject to the opinion of the Court on any questions of law arising the arbitrators awarded that the owners were entitled to recover from the charterers the before-mentioned sum.

If the Court should be of opinion that the above award was wrong, then the arbitrators awarded that the owners should recover nothing from the charterers.

SANKEY, J., affirmed the award. The charterers appealed.

SCRUTTON, L. J.¹ The steamship *Thrasyvoulos* was lost by fire while being discharged by workmen employed by the charterers. Experienced arbitrators, by whose findings of fact we are bound, have decided that the fire was caused by a spark igniting petrol vapour in the hold, the vapour coming from leaks from cargo shipped by the charterers, and that the spark was caused by the Arab workmen employed by the charterers negligently knocking a plank out of a temporary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour.

On these findings the charterers contend that they are not liable for two reasons: first, that they are protected by an exception of "fire" which in the charter is "mutually excepted"; secondly, that as the arbitrators have found that it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim. In my opinion both these grounds of defence fail.²

. . .

The second defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that some one finding the cheque should commit forgery: *London Joint Stock Bank v. Macmillan* [(1918) A. C. 777]; while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter

¹ The concurring opinions of Bankes, L.J., and Warrington, L.J., are omitted.

² The judge's discussion of the first of the charterers' contentions is omitted.

to the person libelled: *Weld-Blundell v. Stephens* [(1920) A. C. 956]. In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results.³ Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in *Smith v. London and South Western Ry. Co.* [L. R. 6 C. P. 14], and by the majority of the Court in Banc in *Rigby v. Hewitt* [5 Ex. 240] and *Greenland v. Chaplin* [5 Ex. 243], and approved recently by Lord Sumner in *Weld-Blundell v. Stephens* [(1920) A. C. 983, 984] and Sir Samuel Evans in *H. M. S. London* [(1914) P. 76, 77]. In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused.

For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

*Appeal dismissed.*⁴

NOTE

Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 96-97, 69 N. W. 640 (1896): "It is laid down in many cases and by some text writers that, in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. . . . The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of *Hadley v. Baxendale*, 9 Exch. 341. This

³ Cf. Prosser, Torts, 352 (1941): "An intervening force is one which comes into active operation in producing the result after the actor's negligent act or omission has been committed."

⁴ For comments upon this case see 32 Yale L. J. 276 (1923); 42 L. Q. Rev. 407 (1926); 1 Camb. L. J. 206 (1922). For an excellent discussion of the problem of proximate cause, see Prosser, *op. cit. supra*, c. 8.

mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of 'negligence' with that of 'proximate cause.'

"What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent then the person guilty of it is equally liable for all its natural and proximate consequences whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause,⁵ from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

PROBLEMS

(1) When, according to the *Polemis* and *Christianson* cases, may a negligent act or omission be said to be the proximate cause of an injury?

(2) Do you agree with McNair, *This Polemis Business*, 4 Camb. L. J. 125, 143 (1931): "In the *Polemis Case* there was an express finding by the arbitrators 'that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.' I submit that if the shipowners could only have sued the charterers for breach of contract, that finding of fact would have been fatal and would have prevented them from recovering the value of the ship."

MAUNEY v. GULF REFINING CO.

Supreme Court of Mississippi, 1942. 193 Miss. 421, 9 So.2d 780.

Action by Mrs. Riley Mauney against the Gulf Refining Company and others for personal injuries. From a judgment for defendants, the plaintiff appeals. On motion to strike. Motion sustained in part and overruled in part. On merits. Affirmed.

⁵ Cf. Prosser, *op. cit. supra*, at 352: "The defendant will not be relieved of liability by an intervening force which could reasonably have been foreseen, nor by one which is a normal incident of the risk created," but he will be, "by an unforeseeable and abnormal" one "which produces a result which could not have been foreseen."

GRIFFITH, J., delivered the opinion of the court on merits.

Appellee Gulf Refining Company is a wholesale distributor of gasoline, and Tapp, another appellee, was the agent in charge of the tank motor car which, on the afternoon in question, was delivering gasoline to a filling station on the northwest corner of Walnut and Commerce streets in the town of Ripley. During the process of the delivery a fire was suddenly started, which rapidly spread to the tank car and to the filling station itself. Many people were nearby; and about all of them ran from the scene, raising loud shouts of fire, and that the tanks were about to blow up, and the whole town of Ripley with them.

Appellant was in a cafe operated by her and her husband, and which was situated on the northeast corner of Walnut and Commerce streets, and about fifty feet across Commerce street from the filling station. When appellant heard these shouts she went to the front of her cafe, and seeing the fire and still hearing the shouts, she turned to get her two-year-old child, then also in the cafe, and about five feet away; and being greatly fearful of the safety of the child, her purpose was to flee from the cafe when she had got the child in her arms. In her hurry to get to the child she fell over a misplaced chair, and as a result of the fall she suffered a miscarriage. She sued by attachment in chancery,¹ contending that the fire was the proximate cause of her misfortune. After a full hearing the chancellor dismissed the bill. While perhaps immaterial, it may be mentioned by way of completion of the picture, that the fire did not spread to the cafe.

The rule is firmly established in this state, as in nearly all the common law states, that in order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, *D'Antoni v. Albritton*, 156 Miss. 758, 766, 126 So. 836; *Williams v. Lumpkin*, 169 Miss. 146, 152, 152 So. 842; but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occur-

¹ See Miss. Code Ann. § 2729 (1942): "The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements in this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance."

rence, although such happening is within the range of possibilities. *Illinois Cent. R. Co. v. Bloodworth*, 166 Miss. 602, 617, 145 So. 333; *Burnside v. Gulf Refining Co.*, 166 Miss. 460, 470, 148 So. 219; *Shuptrine v. Herron*, 182 Miss. 315, 180 So. 620. This rule is affirmed in one way or another in cases which will run into the hundreds in this state.

In *Gulf Refining Co. v. Williams*, 183 Miss. 723, 185 So. 234, it was pointed out that in speaking of probable results as applied to foreseeability it has not been meant to include only those more apt to happen than not to happen, but embraces those which the negligent actor should have foreseen as something likely to happen, although the likelihood may not amount to a comparative probability; but in the same case it was again admonished that more than a remote possibility is necessary to fulfill the requirements to the rule of liability,—that the likelihood which furnishes the essential ligament between the negligence and the injury must be one of weight and moment.

The settled law in this state may be summarized in the form of a diagram, as follows: The area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameters of the circle, and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which, although foreseeable, were foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle,—in all of which time, place and circumstances play their respective and important parts.

The difficulty is not in the rule, but in applying the facts of a particular case, and in determining whether the facts bring the case within the circle which limits the rule, or whether they fall beyond it. And always this difficulty is heightened by the pressure of argument to the effect that so long as the force of the negligent act is still traceable as being of some effect, the circle of liability will be large enough to include any injury thus traceable to the original wrong, thereby losing sight or seeking to put out of view that mere possibilities are never within the circle, although traceable to the cause within it. Those so contending stand on the vantage ground of what has happened, and look back in one direction from effect to cause, whereas the rule with which they are dealing is one which looks forward, not in one direction, but in all directions, and not to what has happened, but to what is likely to happen,

—from cause to probable effect. The actor does not have the advantage as he thus looks forward in all directions as to what is likely to happen as compared with him who looks backward, in one direction only, upon the picture after it has been finished.

In such a situation, as indeed in most situations, the principles of the common law must be kept within practicable bounds and so as not to occupy an attitude which would place it over and above the heads of those who must carry on the every day affairs of life. Hence, the law must say, as it does, that "care or foresight as to the probable effect of an act is not to be weighed on jewelers' scales, nor calculated by the expert mind of the philosopher, from cause to effect, in all situations," *Illinois Cent. R. Co. v. Bloodworth*, supra, 166 Miss., page 618, 145 So. page 336; and that it would impose too heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable. 38 Am. Jur., p. 713, sec. 61. As said by this court in *Meridian Grain, etc., Co. v. Jones*, 176 Miss. 764, 776, 169 So. 771, 772, quoting Pollock on Torts (9 Ed.), p. 41: "A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible."

With these considerations in view, we may concede, but without so deciding, that (1) the starting of the fire and the spread thereof was through the negligence of appellees, and that (2) appellees should have foreseen as a likelihood that (a) all bystanders would flee from the immediate vicinity, and in so doing would raise a shout of fire and a clamor that the tanks are about to blow up and the town with them; that (b) appellant, who was on the inside of the cafe across the street on the adjoining corner, would hear this hue and cry, and would come to the front of the cafe to see what was happening, and that (c) upon so ascertaining she, too, would flee from the scene or from that immediate vicinity.

So assuming, we arrive at the question (d) whether appellees can, within the rule aforesaid, be held to the liability of having been obliged to foresee, as something likely to happen at that distance away, taking also into consideration the circumstances of time, that appellant in her preparation for departure would run over a misplaced chair in her own place

of business, this being the actual or immediate agent of her injury, or whether this fallen chair and her running over it was a mere possibility, so far as foreseeability is concerned,—something not naturally or ordinarily incident to such a sequence of events, something which although, of course, possible was nevertheless not likely to happen as a likelihood of weight and moment; and this question as to liability we must answer in the negative.

We have so answered under the law as we interpret it, but the equities of the particular case run with the law when the case is examined on its intrinsic merits. Appellant replied in response to one of the interrogatories that she was in control of herself at the time she fell over the chair, but that she was hurriedly trying to get to her child, about five feet away, and did not see the chair. If appellant didn't see a chair in her way in her own place of business, it would impose an inadmissible burden upon appellees to say that they should have foreseen from across the street and through the walls of a building on another corner what appellant didn't see right at her feet and in an immediate situation entirely familiar to her. Suppose she had run to the sidewalk and thence against a lamp post, or into the street and against a parked automobile. Or suppose she had run into a pedestrian, injuring him. These remote eventualities could be multiplied almost without number.

It is urged that the chancellor placed his decision on the ground that the causal connection between the negligence and the damage was broken by the intervention of independent and responsible human acts, and that, therefore, the injury was not the proximate result of the negligence; and from this it is argued that he did not decide the case upon the issue upon which we are acting in affirming the decree, and that we should remand the case for a finding of the facts upon which we have here proceeded. We have stated the facts bearing upon the latter point as disclosed by the testimony of appellant and her own witness, disregarding that of appellees. Upon her own facts we think she has no case, and we can and should affirm in that situation, similarly to the course taken when we affirm on the giving of a peremptory instruction to a jury.

Affirmed.²

² Cf. *Button v. Pennsylvania R. R.*, 115 Ind. App. 210, 57 N.E. 2d 444 (1944): "To make one liable for negligence it is not necessary that he should have foreseen the particular or precise injury that in fact occurred. If he negligently created a condition from which he might reasonably have anticipated a certain class of injuries might very likely result, and if the resulting injury was of such class, his negligence is actionable. The complaint alleges that the highway

PROBLEM

When, according to the *Mauney* case, may a negligent act or omission be said to be the proximate cause of an injury?

SECTION 4. SPECIFIC REPARATION

SANFORD v. BOSTON EDISON CO.

Supreme Judicial Court of Massachusetts, 1944. 316 Mass. 631, 56 N.E. 2d 1.

Bill in Equity, filed in the Superior Court on September 2, 1943.

A demurrer was sustained by *Greenhalge, J.*

QUA, J. This bill is brought by officers of United Brotherhood of Edison Workers, hereinafter called the union, in behalf of themselves and all other members, who "are too numerous to be joined as plaintiffs herein."¹ Its allegations are in substance these: On May 24, 1940, the union and the defendant entered into a written contract attached to the bill. Article 5, § 7, of the contract is as follows: "The Company will not by general rule or otherwise refuse to recognize assignments of wages when made in accordance with the provisions of Chapter 96 of the (Massachusetts) Acts of 1933." A large number of members of the union have executed written assignments of a portion of their future wages to be deducted each month for the payment of their dues to the union, and the company has heretofore in accordance with its agreement deducted the amounts so assigned from the wages of said members and has forwarded said deductions to the union; but on or about August 31, 1943, the defendant notified the union that it would thereafter refuse to recognize such assignments of wages for the payment of dues by approximately one hundred twenty members of the union, whose assignments contained written requests for the deduction of their union dues from the wages of the respective assignors; and that it would not deduct the amounts so assigned from said members' checks and would not forward the aggregate of such amounts to the union. The de-

involved 'is a heavily traveled one at all times of the day and night' of which fact the appellee was fully aware. That to cover a curve in such a highway with a dense cloud of smoke, through which travelers cannot see, might result in a traffic accident, as Pollock says, 'appears likely in the known course of things.' The injury that actually befell [the driver of the car missed the curve and drove off the road and into a telephone pole] can be classified as a traffic accident and thus was reasonably foreseeable," although defendant "could not reasonably have anticipated that the automobile . . . when enveloped with smoke, would run off the road and collide with a telephone pole." Cf. also *Johnson v. Kosmos Portland Cement Co.*, 64 F. 2d 193 (C.C.A. 6th 1933).

¹ This is an instance, therefore, of what is known as a class or representative action. See Clark, *Code Pleading*, 396 *et seq.* (2d ed. 1947).

fendant refused to forward such amounts which became due on September 1, 1943. The union has fully performed the contract on its part and will suffer irreparable damage for which it has no plain, complete, and adequate remedy at law.

The prayers of the bill are that the defendant be enjoined from refusing to recognize the assignments, for specific performance of the contract, and particularly of art. 5, § 7, and for an execution for the amount due the union.

The contract referred to in the bill and annexed to it recites that the union has been organized by employees of the defendant; that all the employees are eligible to membership (with some exceptions as to employees exercising powers of discipline); and that a majority of such employees are members and have designated the union as their exclusive collective bargaining representative. It contains, in addition to the "check off" provision set forth in the bill, elaborate provisions relating to wages, hours, tenure of employment, and settlement of disputes. It seems intended to regulate generally the relations of the defendant to its employees in such matters as are commonly the subject of collective bargaining.

Statute 1933, c. 96, to which reference is made in the contract, added a new § 8 at the end of G. L. (Ter. Ed.) c. 154. The new section provides that none of the earlier sections of the chapter (which regulates and limits assignments of future wages) should be applicable to or control or prohibit the deduction of labor or trade union or craft dues or obligations from wages of an employee in accordance with a written request made by the individual employee.

The defendant demurred to the bill on the grounds that the plaintiffs have not stated a cause of action and that they have a plain, adequate, and complete remedy at law.

1. In our opinion the bill states a cause of action for specific performance of the defendant's promise to recognize the assignments. A decree to that effect could easily be enforced and is open to none of the objections that sometimes prevent relief of that character. Only by ordering specific performance can the court secure to the plaintiffs the real benefit of their contract. That contract is the joint property of all the members of the union. They can enforce it jointly by means of this suit brought in behalf of all. A series of law suits brought at intervals as long as the contract remains in force to recover the sums assigned, which by the terms of the assignments are payable to the union monthly, would not give the union the benefit of the "check off." The parties intended that the union should secure regular payment of the dues of its members while

they were earning wages. Labor considers this important, especially under present conditions. It was in part to get this that the plaintiffs gave their own promises which formed the consideration on their part for the contract. The defendant agreed to it. The defendant should not be allowed to substitute for the "check off" which it promised a choice of either continuous litigation or long delay in the receipt of the sums due. See *R. H. White Co. v. Murphy*, 310 Mass. 510, 518, 38 N. E. 2d 685.

There is a growing tendency to give the promisee the actual performance for which he bargained, if he prefers it, instead of a substitute in damages, where the damages are not the equivalent of the performance. Williston states the general rule defining instances where specific performance will be granted in these words, "where damages are an inadequate remedy and the nature of the contract is such that specific enforcement of it will not involve too great practical difficulties, equity will grant a decree of specific performance." Williston on Contracts (Rev. ed.) § 1418, at page 3952. This rule is applied in proper cases involving collective bargaining contracts. Williston on Contracts (Rev. ed.) § 1423A, and cases cited. See "The Present Status of Collective Labor Agreements," 51 Harvard Law Review, 520.² In Am. Law Inst. Restatement: Contracts, § 361³ (e), comment i, it is said: "Damages are not adequate if full compensation for resulting harm will involve the plaintiff in multiple litigation, either with several different parties or in the form of repeated actions against the defendant." See also § 372. A number of cases in this Commonwealth illustrating in greater or less degree the broadening tendency in applying the remedy of specific performance will be found in the footnote.⁴ . . .

² See also 37 Ill. L. Rev. 456 (1943).

³ This section provides: "In determining the adequacy of the remedy in damages, as to contracts other than for the transfer of an interest in land [see § 360], the following factors are influential and may singly or in combination justify specific enforcement:

- "(a) the degree of difficulty and uncertainty in making an accurate valuation of the subject matter involved, in determining the effect of a breach, and in estimating the plaintiff's harm;
- "(b) the existence of sentimental associations and esthetic interests, not measurable in money, that would be affected by breach;
- "(c) the difficulty, inconvenience, or impossibility of obtaining a duplicate or substantial equivalent of the promised performance by means of money awarded as damages;
- "(d) the degree of probability that damages awarded cannot in fact be collected;
- "(e) the probability that full compensation cannot be had without multiple litigation."

⁴ Citations omitted and also the paragraphs of the opinion, numbered 2 to 4, inclusive, in which the court overruled certain objections of defendant to the complaint which are not relevant to our present purposes.

5. The remaining contention of the defendant is that this is a case involving or growing out of a labor dispute as defined by G. L. (Ter. Ed.) c. 149, § 20C, inserted by St. 1935, c. 407, § 1, and therefore that the plaintiffs must allege and prove the several preliminary matters required to be established by G. L. (Ter. Ed.) c. 214, § 9A, inserted by St. 1935, c. 407, § 4, before an injunction can issue in a case involving or growing out of a labor dispute.⁵ See *Mengel v. Justices of the Superior Court*, 313 Mass. 238, 47 N. E. 2d 3. But we need not decide whether this bill to enforce the performance of an existing contract does or does not involve or grow out of a labor dispute; since it is possible for the plaintiffs to prevail in this suit without resort to any injunctive relief. The facts that art. 5, § 7, of the contract, which the plaintiffs seek to enforce, is couched in negative language and that two of the prayers of the bill take the form of prayers for injunctive relief must not be allowed to confuse the situation. In spite of its form, art. 5, § 7, of the contract is in real substance an affirmative promise to recognize assignments of wages. It can be enforced by a decree in affirmative form commanding the defendant to recognize such assignments. A decree in that form would not in our opinion be an injunction within the meaning of G. L. (Ter. Ed.) c. 214, § 9A, and that section has no application to the case, whether or not the case involves or arises out of a labor dispute. Although the word injunction is sometimes used to include more than *merely* preventive relief, it more commonly refers to relief of that character. *Department of Public Utilities v. Trustees of New York, New Haven & Hartford Railroad*, 304 Mass. 664, 671, 24 N. E. 2d 647. It is not the word that would ordinarily be used to describe a decree compelling the performance of a contract by the taking of affirmative action required by the terms of the contract. The statute involved (G. L. [Ter. Ed.] c. 214, § 9A; inserted by St. 1935, c. 407, § 4) is the core of what is commonly called the anti-injunction law. It is fair to say that its principal purpose was to regulate the issuance of injunctions restraining the acts of labor unions in trade controversies, that is to say, to regulate preventive injunctions. If its purpose had been to regulate and restrict relief in equity

⁵ § 9A provides that no court shall have jurisdiction to issue an injunction in any case involving or growing out of a labor dispute except after hearing the testimony of witnesses in open court and except after the court has found that unlawful acts have been threatened or committed and will be committed or continued unless restrained; that substantial and irreparable injury to the complainant's property will follow; that if the relief sought is denied greater injury will be inflicted upon the complainant than would be inflicted upon the defendants by granting the relief; that the complainant has no adequate remedy at law; and that the public officers charged with the duty of protecting complainant's property are unwilling or unable to do so.

of other kinds there would have been apt words to that effect. Instead, the statute refers only to relief by injunction. It is settled that the statute was not intended to change the law of substantive rights. *Simon v. Schwachman*, 301 Mass. 573, 579-582, 18 N. E. 2d 1; *Quinton's Market, Inc. v. Patterson*, 303 Mass. 315, 318-319, 21 N. E. 2d 546; *Fashioncraft, Inc. v. Halpern*, 313 Mass. 385, 389, 48 N. E. 2d 1.

Moreover, the conditions imposed by § 9A upon the issuing of injunctions, while appropriate as regulations upon the issuing of preventive injunctions, are in a number of respects inappropriate if applied to ordinary kinds of affirmative relief. Thus paragraph (a) of subsection (1) refers only to "acts [that] have been threatened and will be committed unless restrained or [that] have been committed and will be continued unless restrained." Paragraph (b) requires a finding that "substantial and irreparable injury to the complainant's property will follow." Paragraph (c) requires a comparison of the injuries to the opposing parties to be expected from granting or denying relief. Paragraph (e) requires a finding that "the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection." Subsection (2) requires notice of the hearing to be given to public officials charged with the duty to protect the "complainant's" property, again apparently assuming that prevention of a threatened injury is the relief sought. And subsection (5) provides in part that "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only *a prohibition* (italics ours) of such specific act or acts as may be expressly complained of in the bill of complaint or petition" See *Virginian Railway v. System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U. S. 515, 563, 57 S. Ct. 592, 81 L. Ed. 789. Such provisions as these, applicable alike to all cases without discrimination, would be out of place if the statute had been intended to control the granting of affirmative relief. It is also significant to note that G. L. (Ter. Ed.) c. 220, § 13A, inserted by § 5 of St. 1935, c. 407 (the same act that inserted the anti-injunction provisions to which reference has just been made), in providing for the right of jury trial in certain contempt proceedings in labor cases grants that right only where the contempt consists in "doing any act or thing in or by such writ, process, order, decree or command forbidden to be done by him" and so does not apply to a contempt which consists in failure to perform a decree ordering affirmative relief.

In our opinion, if at the hearing on the merits the plaintiffs prove the facts alleged, and if no other facts requiring a contrary result are disclosed, the plaintiffs will be entitled to a decree compelling the defendant to recognize assignments of wages in accordance with art. 5, § 7, of the contract and to pay to the union the sums due and to become due on such assignments as long as the contract remains in force and the union continues on its part substantially to perform the contract. The decrees must therefore be reversed, and an interlocutory decree must be entered overruling the demurrer.

So ordered.

NOTES

(1) Maitland, *Equity*, 318-319, 320-321 (2d ed. 1936)*: "Let us see what an injunction is. It is an order made by the Court forbidding a person or class of persons from doing a certain act, or acts of a certain class, upon pain of going to prison for an indefinite time as contemnors of the Court. This penalty will not be mentioned in the injunction, but if knowing of an injunction you break it, then the Court has a large discretionary power of sending you to prison and keeping you there."

"I will give you an example or two of the form that an injunction takes. 'Let an injunction be awarded against the defendants, the Mayor, Aldermen and Burgesses of Leeds to restrain the said defendants, their servants, agents and workmen from causing or permitting the sewage of the borough of Leeds or any part thereof to flow or pass through the main sewer or any other outfall into the river Aire unless and until the same shall be sufficiently purified and deodorized so as not to be or create a nuisance or become injurious to the public health.'

"'Let the defendant E be restrained from infringing the plaintiff's trade marks registered under the Trade Marks Registration Act 1875, or either of them, and from selling or offering for sale any tea in, or from otherwise using, wrappers having imprinted thereon any imitation or colourable imitation of the plaintiff's trade marks or either of them.'

"'Let an injunction be awarded to restrain the defendant from using or permitting to be used the premises called X or any part thereof for the purpose of balloon ascents, fireworks, dancing, music, or other sports or entertainments, whereby a nuisance may be occasioned to the annoyance or injury of any inmates of the asylum in the pleadings mentioned.'

"In general an injunction forbids a defendant to do certain acts, but sometimes it forbids him to permit the continuance of a wrongful state of things that already exists at the time when the injunction is issued. The Court does not merely say 'Do not build any wall to the injury of the plaintiff's right of light'; it can say 'Do not permit the continuance of any wall to the injury of the plaintiff's right of light.' If such a wall already exists then the defendant is, in effect, told to pull it down. An injunction which takes this latter form, an injunction forbidding the defendant to

* By permission of Cambridge University Press, the publisher.

permit the continuance of an existing state of things is called a mandatory injunction.”⁶

(2) Restatement, Contracts § 358 (1932): “A decree for specific performance is a court order the purpose of which is to produce as nearly as may be the same effect as the promised performance would have produced.

“The most common remedy for breach of contract is a judgment for compensatory damages; and it is usually regarded as adequate to satisfy the requirements of justice. In cases where it is not so regarded, a decree for specific performance is available at the election of the plaintiff as another and more effective remedy, subject to the limitations in §§ 359–380 [which you will consider in the course called Equity or by some similar name]. In the law of some countries, the granting of a decree for specific performance does not depend upon the inadequacy of other remedies. Instead, it is one of the remedies granted as freely as any other if the case is one in which specific enforcement is feasible and if justice seems to require it.”

(3) Krassa, *Interaction of Common Law and Latin Law: Enforcement of Specific Performance in Louisiana and Quebec*, 21 Can. B. Rev. 337–338 (1943)*: “In awarding specific relief to a complainant, a legal system may rely on either or both of two types of remedies; one consists in compulsion directed towards performance by the debtor himself; the second substitutes the debtor’s performance with acts of the creditors or of officers of the court. Injunction, contempt and jail belong to the former type; levy by a sheriff, to the latter. The choice between the two types is influenced in the various countries not only by considerations of practical advantage,⁷ but also by philosophical and political preferences which determine the main characteristics of legal systems.

“Seen from this angle the choice of enforcement devices presents the following contrast: In Latin countries, the ruling principle is *nemo ad praecise factum cogi potest*, and compulsion *in personam*, aiming at coercing the debtor into a specific behavior, is never resorted to. A man is free not to fulfill his engagements if he is prepared to become liable in damages. A court cannot deprive him of this freedom by using violence which cannot be made a means of enforcement. The only specific remedy lies in various substituted activities of the court, its officers or the creditor. Although some notable attempts have

⁶ A mandatory injunction is now usually put in the form of a direct order to do the act required by the Court. [Author’s footnote.]

* By permission of The Canadian Bar Review.

⁷ There are situations where specific relief can be accomplished by adjudication of rights, which is equally valuable to the complainant as performance by the debtor: the judgment to be the deed, the lease, to establish ownership or other rights. But where a court officer, such as the sheriff, is to perform in defendant’s stead, not only are the situations where such is feasible fewer than those where defendant can be compelled to perform personally: in addition, the expenses of such performance must usually be advanced by the plaintiff. That makes the remedy approach the level of the court’s sanctioning plaintiff’s performance at the defendant’s expense. In both situations plaintiff has to look to the regular execution machinery to recover his expenses from defendant, and his only advantage—great as it may be under certain circumstances—is that defendant is enjoined from resisting such substituted performance. [Author’s footnote.]

been made to introduce analogous principles into the administration of the English law of contracts they have on the whole been unsuccessful. In all common law jurisdictions, many substantive duties are enforced specifically not only through substituted activities of the creditor or the court, but also through strong personal compulsion of the debtor.⁸ A common law judge, on the whole, does not believe that it lies in the mouth of the defaulting debtor to complain of the 'violence' used to obtain performance of his promise."

WHEELLOCK v. NOONAN

Court of Appeals of New York, 1888. 108 N.Y. 179, 15 N.E. 67.

This action was brought to compel defendant to remove from certain lots belonging to plaintiff, situate in the city of New York, a quantity of rocks or boulders placed thereon by defendant.

The material facts are stated in the opinion.

FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots in the upper part of the city of New York a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of fourteen to eighteen feet. This conduct was a clear abuse of the license and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct and ordered him to remove the rocks to some other locality. The defendant promised to do so but did not, and in the

⁸ In common law jurisdictions, such duties are usually imposed by injunctions. The term is not always used in case of final judgments ordering the doing of an act. Pomeroy, *Specific Performance of Contracts* (3rd ed. 1926) sec. 23, just speaks of "decreeing," "compelling" specific performance. But he uses the term injunction for final decrees forbidding an act. *Ib.* secs. 24, 25. On the other hand, Kerr, *A Treatise on Injunctions* (6th ed. by Patterson, 1927) 479 et seq., speaks of "mandatory injunctions" in final judgments to enforce contracts. Relevant for this study is only that in all these cases the decree will be enforced by the contempt power of the court—fine and imprisonment. [Author's footnote.]

face of repeated demands has neglected and omitted to remove the rocks from the land.

The court found as matter of law from these facts that the original permission given did not justify what was done either as respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring and the demand for the removal of the rock the defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court. . . .

It is now said that the remedy was at law; that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal.¹ If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary the law is the other way. (*Beach v. Crain*, 2 N. Y. 86, 97.) And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of *Uline v. New York Central and Hudson River Railroad Company* (101 N. Y. 98, 4 N. E. 536), demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass, new actions following on in succession would have to be maintained. But in a case like the present would that be an adequate remedy? In each action the damages could not easily

¹ Cf. *American Wrecking Co. v. McManus*, 174 Wis. 300, 181 N.W. 235, modified 174 Wis. 300, 183 N.W. 250 (1921), an action to recover \$1,327.55 as the reasonable value of the services of plaintiff who was employed by defendant, a sheriff, to remove heavy machinery, etc., which by a writ of restitution the sheriff was required to remove from a certain building and which could be moved only by tackle and other apparatus. The court held that the sheriff was liable to plaintiff and that the plaintiff in the action in which the writ issued was liable to the sheriff for this sum.

be anything more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and, if there were no other adequate remedy, defiantly continue such occupation and, in spite of his wrong, make of himself, in effect, a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation and any remedy which does not or may not end it, is not adequate to redress the injury, or restore the injured party to his rights. On the other hand such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *die de diem*, for the renewed damages flowing from the continuance of the trespass, and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided and especially under circumstances like those before us. The rocks could not be immediately removed. The court have observed that peculiarity of the case and shaped their judgment to give time. It may take a long time and during the whole of it the defendant would be liable to daily actions.

For reasons of this character it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the *Murdoch Case* (*Murdoch v. Prospect Park & Coney Island R. R. Co.*, 73 N. Y. 579) and the rule deemed perfectly settled.

That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the *Uline Case*. (*Bowyer v. Cook*, 4 M. G. & S. 236; *Holmes v. Wilson*, 10 A. & E. 503.) In one, stumps and stakes had been left on plaintiff's land and in the other buttresses to support a road; in each an action of trespass had been brought and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained. So that, as I have said, the legal remedy is identical, however the trespass originated. . . .

In *Avery v. New York Central and Hudson River Railroad Company* (106 N. Y. 142, 12 N. E. 619), to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.²

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.³

SECTION 5. PREVENTING LEGAL WRONGS

CAMPBELL v. SEAMAN

Court of Appeals of New York, 1876. 63 N.Y. 568.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff entered upon the report of a referee.

The action was brought to recover damages resulting from an alleged nuisance, and to restrain the continuance thereof.¹ . . .

EARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years

² Cf. *Fisher v. Goodman*, 205 Wis. 286, 289-290, 237 N.W. 93 (1931), an action for an injunction requiring defendants to remove a foundation and wall from plaintiff's land: "[I]llegal processes are inadequate to permit relief where the invasion consists of an overlapping foundation or wall. It is not reasonable to ask a sheriff to remove the invading portion of that wall or foundation, as he is guilty of trespass if in doing so he invades by a hairline the property of the defendants. The proceeding is as delicate and impracticable as the taking of the pound of flesh. The responsibility of removing the wall should, in justice, be left to the party who built it, and this the remedy of mandatory injunction does. If the plaintiff be left to his or her remedy in ejectment, that remedy must prove wholly inadequate. If it be said that the invasion is one of continuing trespass, a multiplicity of suits will follow. Either of these considerations is abundantly sufficient to support the jurisdiction of a court of equity."

³ See *Donovan v. Kissena Park Corporation*, 181 App. Div. 737, 168 N.Y. S. 1035 (2d Dep't 1918). Cf. *Bowles, Price Administrator, v. Skaggs*, 151 F. 2d 817 (C.C.A. 6th 1945). For a collection of cases, see Note, 32 A.L.R. 471 (1924). See also Walsh, *Equity*, §§ 30-32 (1930); 4 Pomeroy, *Equity Jurisprudence*, §§ 1356-1357 (5th ed. 1941).

¹ The referee's findings of fact and conclusions of law are omitted.

1857, 1858 and 1859 they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiff's white and yellow pines and Norway spruce and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiff's damages from the gas during those years at \$500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiff's land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice James beautifully said, in *Salvin v. Northbrancepeth Coal Co.* (9 Law. R., Ch. Appeals, 705): "If some picturesque haven open its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable or

unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite, mainly, those where the precise question was involved in reference to brick burning.² . . .

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.

Prior to Lord Eldon's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal.³ . . . Here the remedy at law was not adequate. The mischief was substantial and, within the principle laid down

² The court's discussion of the precedents is omitted.

³ Citations omitted. Cf. *The Hecht Co. v. Bowles*, 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

in the cases above cited and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. These damages are irreparable too, because the trees and vines cannot be replaced and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained.

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.⁴ . . .

⁴ In the part of the opinion here omitted the court held that plaintiffs' suit was not barred by acquiescence or laches and that defendant had not acquired a

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick making exists in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant's land is for a brickyard, nor how expensive are his erections for brick making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiffs' damages from its continuance. Hence this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community. . . .

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.*

prescriptive right "to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands."

* See Walsh, *Equity*, §§ 33-36 (1930). See also Durfee, *Cases on Equity*, 493 n. 25 (1928), in which, in connection with the principal case, the editor "directs attention to" *McCord v. Iker*, 12 Ohio 387, 388 (suit to enjoin maintenance of a mill dam which flooded plaintiff's marsh land; nine actions at law had resulted in two verdicts for plaintiff for \$2.50 and \$.01 respectively); *Bassett v. Salisbury Mfg. Co.*, 47 N.H. 426 (same; one action at law tried six times, resulted in four disagreements, one verdict for defendant and one verdict for plaintiff for \$.01, both of which were set aside; another action resulted in a consent judgment for \$40.) Cf. *Kosich v. Poultrymen's Service Corporation*, 136 N. J. Eq. 571, 43 A. 2d 15 (1945); *State ex rel. Attorney General v. Karston*, 208 Ark. 703, 187 S.W. 2d 327 (1945); *People v. Lim*, 18 Cal. 2d 872, 118 P. 2d 472 (1941).

NOTE

King v. Columbian Carbon Co., 152 F.2d 636 (C.C.A. 5th 1945): Action to recover damages because of the operation of a carbon black manufacturing plant alleged to constitute a nuisance. In their complaint plaintiffs conceded "that the business in question is a lawful enterprise engaged in the utilization of a natural product of the community in the manufacture of a useful and necessary commodity. Due to these facts and the further fact that it is not being negligently operated, they admit that an injunction will not lie to compel a cessation of the operation of the plant and an elimination of the consequent damages therefrom." The District Court dismissed the complaint on the ground that in the absence of an allegation of the negligent construction or operation of the plant it did not state a claim upon which relief could be granted. *Reversed.* (i) "[N]uisances may exist without negligence and in such situations it, of course, is not requisite that negligence be alleged" (ii) "As a concession to industrial progress and social utility the law will not abate a useful and lawful enterprise even though it be a nuisance, but further than that the law does not recede. It still requires payment for unwarranted, unreasonable, and substantial damage done to the property of another which is caused by the construction and operation, however skillful, of an industrial plant in a locality undevoted and unadapted thereto."

BERRIEN v. POLLITZER

United States Court of Appeals, District of Columbia, 1947. 165 F. 2d 21.

EDGERTON, ASSOCIATE JUSTICE. The plaintiff sued for an injunction against exclusion of herself and similarly-situated members of the National Woman's Party from the Party's headquarters at 114 B Street Northeast in Washington, D. C. Some of the defendants are members of the Party and others are its employees. The District Court, after a hearing on a motion for a preliminary injunction, dismissed the complaint. The plaintiff appeals.

The Court found substantially the following facts, most of which are alleged in the complaint. The National Woman's Party is a nonstock nonprofit corporation, organized under the laws of the District of Columbia, for the purpose of securing complete equality for women. It owns the building in suit. This building is worth more than \$100,000. It contains "a valuable and unique library, working facilities for . . . members, and facilities for meetings and formal and informal gatherings of members necessary to the work of the National Woman's Party. Said headquarters and its facilities have in the past been used and open to use by all members." In January, 1947, a dispute arose within the Party, in consequence of which some mem-

bers termed others "insurgents." Certain of the defendants, purporting to act as the National Council of the Party, adopted the following resolution:

"Resolved, that all elected and appointed members of the National Council who have identified themselves with the insurgent group be asked to resign and that failure to acquiesce within ten days of receipt of a letter to this effect will be construed as a resignation.

"Be it further resolved that *all* members of the insurgent group be temporarily excluded from Headquarters during pendency of a decision on the question in dispute."

The by laws of the Party provide that its National Council shall have control and management of its affairs. Plaintiff is a member of the Party and of the National Council, but she received no notice of the proposed resolution or of the meeting at which it was adopted. "Since the passage of the resolution the defendants have deprived, and are now depriving, plaintiff and certain other members of the National Woman's Party of access to said headquarters and the enjoyment and use of the same."

The complaint also states that a separate suit is pending to establish the validity of an election at which several of the present defendants were replaced by other persons as members of the National Council. The plaintiff does not ask the court to decide that question in the present suit.

The court held that it had no jurisdiction to grant an injunction because it "can interfere only to protect property rights." We think the court erred.

The doctrine that equity jurisdiction is limited to the protection of property rights conflicts with the familiar principle that equity may give preventive relief when the legal remedy of money damages, if available at all,¹ is inadequate to redress a wrong. Obviously money has little in common with such personal rights or interests as reputation, domestic relations, or membership in nonprofit organizations. Money, one form of property, has much more in common with other forms of property. Invasions of personal interests are accordingly *less* capable of translation into money terms than invasions of property interests. No one can seriously contend that money is an adequate remedy for all sorts of personal wrongs. Clearly "injunctions and similar flexible remedies of equity are much better suited than a speculative action for damages to protect interests of personality"²

¹ Cf. Chafee, Does Equity Follow the Law of Torts? 75 U. of Pa. L. Rev. 1, 27, 35. [This and all other footnotes are the court's.]

² Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 998.

The tradition that equity protects only property rights has been traced³ to a dictum of Lord Eldon which was not only unnecessary but contrary to the decision which evoked it. The decision was that a defendant should be restrained by injunction from publishing personal letters which the plaintiff had written to him.⁴ Dean Pound has pointed out that "the real injury in *Gee v. Pritchard* was an invasion of the right of privacy. In result therefore, a case in which we are told that equity has no jurisdiction to secure interests of personality, and the case always cited since for that proposition, was a pioneer decision finding a way for securing the then unknown right of privacy. . . . Property which had no value as property . . . was a mere formal peg on which to hang the substantial relief."⁵

"Law in action is breaking away from the property limitation which still receives much sanction from law in books."⁶ Even in books, the limitation has begun to lose ground.⁷ Judge Qua, for the Supreme Judicial Court of Massachusetts, has just reviewed the subject in a distinguished opinion from which we quote. "In reading the decisions holding or stating that equity will protect only property rights, one is struck by the absence of any convincing reasons. . . . We cannot believe that personal rights recognized by law are in general less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford than are property rights. . . . We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. . . . A number of courts have tended toward this view. Legal writers support it. There is no such body of authority opposed to it in this [jurisdiction] as to preclude its adoption here."⁸

Even thirty years ago, when Dean Pound published his article on *Equitable Relief Against Defamation and Injuries to Personality*,⁹ there were a few classes of cases in which the property limitation, though often respected in form, was disregarded in substance. One such class involved "wrongful expulsion from

³ Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 *Harv. L. Rev.* 640, 642.

⁴ *Gee v. Pritchard*, 2 *Swanst.* 402, 36 *Eng. Rep.* 670 (1818).

⁵ Pound, *op. cit. supra* note 3, at 643, 644.

⁶ Chafee, *op. cit. supra* note 2, at 998-999.

⁷ "Although the courts have been reluctant to admit that equity had jurisdiction to enforce or protect merely personal rights, and have usually discovered at least a nominal property right on which to base the granting of equitable relief, there are a few cases in which the courts have had the courage openly to repudiate the doctrine that only property rights will be protected, and to assert the jurisdiction of a court of equity to protect personal rights also." 14 *A.L.R.* 300.

⁸ *Kenyon v. City of Chicopee*, 320 *Mass.* 528, 70 *N. E.* 2d 241, 244-245.

⁹ *Supra* note 3. Cf. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 *Yale L.J.* 115.

social clubs where the real wrong complained of is the humiliation and injury to feelings. Here . . . courts of equity generally insist upon some shadow of a property interest, however trivial; actually protecting the feelings, but purporting to protect only the pocketbook Something is found which gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows in order to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule" ¹⁰ "It seems plain that the club member's interests of personality should be the object of consideration regardless of the nature of the club, and that the real question is whether the injury to these interests is sufficiently serious to warrant judicial interference with the internal affairs of a social organization. The court's willingness to decide this fundamental question ought not to depend on the presence or absence of an insignificant interest in club property The member's relation to the association is the true subject matter of protection." ¹¹

Approximately this view has long been enforced, if not distinctly expressed, in some jurisdictions ¹² including the District of Columbia. A plaintiff expelled from a corporation or association not organized for profit need not show that he has even a nominal property interest to protect. Fifty years ago this court recognized that if a member of an incorporated club were expelled without a "regularly conducted" trial on due notice, by "constituted corporate authorities," and a "judgment arrived at . . . in good faith," specific relief could be granted. ¹³ Relief was denied solely because the club had met those requirements. The case contains no suggestion that a property right is necessary. ¹⁴ Some years later we squarely held that a property right is not necessary. Though courts are sometimes reluctant to interfere in the internal affairs of churches, ¹⁵ we held that a member expelled from a church in violation of its procedural rules was entitled to relief in equity, and we pointed out that "no temporal rights" of the member were involved. ¹⁶

¹⁰ Pound, *op. cit. supra* note 3, at 672.

¹¹ Chafee, *op. cit. supra* note 2, at 1000, 1007.

¹² E. g. *Barry v. The Players*, 147 App. Div. 704, 132 N.Y.S. 59, affirmed 204 N.Y. 669, 97 N.E. 1102.

¹³ *De Yturbide v. Metropolitan Club*, 11 App.D.C. 180, 195. Cf. Chafee, *op. cit. supra* note 2, at 1014; *Protection of Membership in Voluntary Associations*, 37 Yale L.J. 368. It is immaterial that the form of action in the *De Yturbide* case was mandamus.

¹⁴ The opinion states that the club had legal authority to own property but does not state that it owned any.

¹⁵ Pound, C., in *Bonacum v. Harrington*, 65 Neb. 831, 91 N.W. 886; Chafee, *op. cit. supra* note 2, at 1023 ff.

¹⁶ *Taylor v. Jackson*, 50 App.D.C. 381, 383, 273 F. 345, 347. Cf. *United States ex rel. Johnson v. First Colored Baptist Church*, 56 App.D.C. 324, 13 F. 2d 296.

It is obviously immaterial that the National Woman's Party is called a party and not a club or a church.

Appellees suggest that appellant has not been expelled. We think the resolution purports to expel her, but we also think it immaterial to the court's jurisdiction¹⁷ whether she has been expelled from membership or merely excluded from a member's essential privilege of using the Party's quarters. She has been excluded without a "regularly conducted" trial, on due notice, by "constituted corporate authorities," and a "judgment arrived at . . . in good faith." The District Court has jurisdiction to grant an injunction. It should proceed to determine whether it should exercise this jurisdiction.¹⁸

Reversed

¹⁷ Cf. *Stein v. Marks*, 44 Misc. 140, 89 N.Y.S. 921, 926.

¹⁸ Cf. *Chafee*, *op. cit. supra* note 2, at 1008, 1020 ff.

Chapter II

THE AWARD OR DENIAL OF A REMEDY

SECTION 1. THE FORM AND FUNCTIONS OF A JUDGMENT

SHIPMAN, COMMON LAW PLEADING

3d ed. 1923. 47-48.*

The final judgment or decree is the award of the relief provided by law for the redress of injuries or the enforcement of rights, as that the plaintiff do recover his damages, his debt, his possession, and the like, and the whole suit or action is merely the vehicle or means of pursuing and making application for this award. A suit or action may be defined as a proceeding to obtain a judgment (which term we may use to include the decrees of courts of equity), which is the great object and end of all contentious proceedings. The final judgment is the conclusion of law officially pronounced and declared by the court upon the facts found, after due deliberation and inquiry, declaring that the plaintiff has either shown himself entitled, or has not, to recover the redress he sues for. . . .

Judgments of the common-law courts did not lay commands upon wrongdoers, nor directly seek to make them repair their wrongs. The judgment was simply that the plaintiff do recover the possession, or debt, or damages. The law then sought by the exertion of physical force through the sheriff and the seizure of defendant's property to give the plaintiff the redress awarded. The sheriff was invested with legal authority under writs of execution to sell and transfer title to the defendant's property subject to debts, and by such seizure and sale to pay the money judgment out of the proceeds. But in no case was it adjudged that the defendant at common law be compelled to act or aid the plaintiff or sheriff to do justice or satisfy the judgment. The defendant need merely submit to the authorized acts of the sheriff. The defendant could not at common law be called before the court and be punished for a contempt because he did not actively exert himself in surrendering his property or disclosing its whereabouts to the officer, so that he might carry out and satisfy the judgment. . . .

* This and all other extracts from this work quoted in this book are included herein by permission of West Publishing Company, the publisher.

NOTE

Martin, Civil Procedure at Common Law, 314-315 (1905)**: "In defining a judgment the authors and jurists of ancient times affected to represent it as the determination and sentence of the law and not the determination or sentence of the judge pronouncing it, believing that it would more effectually command the obedience of suitors and the approbation of the community if it was regarded as the act of the law, which was acknowledged to be binding on all, rather than the act of judges, who were known to be fallible like other men. . . .

"In the style of the ancient judgment, all mention of it or the action of the judges is avoided; it is not *decreed* or *resolved* by the court, but it *'is considered by the court'* . . . that the plaintiff do recover his damages, his debt, his possession and the like; which implies that the judgment is none of their own, but the *act of law*, pronounced and declared by the court.

"It is needless to remark that this view of the nature of a judgment is not strictly accurate; if it were, there never could be an erroneous judgment. In consequence of this, the old definition has undergone a slight modification in modern times. A judgment is the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its judgment."

ELLINWOOD v. BENNION

Supreme Court of Utah, 1929. 73 Utah 563, 276 P. 159.

STRAUP, J. Plaintiff brought this action to recover damages for an alleged failure of the defendants to deliver cattle to the plaintiff in accordance with a contract entered into between them. The defendants pleaded a denial of the breach and counterclaimed for damages alleged to have been sustained by them on account of a shortage in the weight of cattle theretofore sold and delivered to the plaintiff. The case was tried to a jury, who rendered a verdict of no cause of action on the complaint and no cause of action on the counterclaim. The defendants prosecute this appeal. No appeal is taken by the plaintiff.

A motion is made by the plaintiff to dismiss the appeal on the ground that no judgment was rendered or entered on the verdict and that what is denominated the judgment appealed from is not a judgment but at most a mere order for a judgment. Our statute (section 6861, Comp. Laws Utah 1917) provides that, when trial by jury is had, judgment must be entered by the clerk in conformity to the verdict within 24 hours after the rendition of the verdict.¹ By section 6865, Comp. Laws Utah 1917, as

** This and all other extracts from this work quoted in this book are included herein by permission of West Publishing Company, the publisher.

¹ This statute is now Utah Code Ann. § 104-30-8 (1943). After providing as stated by the court it continues: ". . . unless the court orders the cause to be reserved for argument or further consideration, or grants a stay of proceedings."

amended by Laws Utah 1925, p. 198, it is provided that the clerk must keep, with the records of the court, a judgment book in which all judgments and findings of fact shall be entered and that a judgment shall be deemed entered for all purposes except the creation of a lien on real property, when it is signed by the judge and filed with the clerk. Section 6867, Comp. Laws Utah 1917, as amended by Laws Utah 1925, p. 112, provides that immediately after entering the judgment the clerk must attach together and file the following papers which constitute the judgment roll, among others the pleadings, copy of the verdict, and a copy of the judgment. By section 6868, Comp. Laws Utah 1917, it is provided that immediately after filing the judgment roll the clerk must make the proper entries of the judgment under appropriate heads in the docket kept by him, which is designated the "judgment docket."

What is here denominated the judgment appealed from is:

"(Title of Court and Cause.)

"Judgment on Verdict.

"Whereas, on the 29 day of October, 1927, a jury regularly and duly impaneled according to law, after hearing the evidence offered on behalf of the plaintiff and on behalf of the defendants and after having been fully advised as to the law in the case and having heard the arguments of the respective counsel and thereupon returned to the court its verdict for the plaintiff on the plaintiff's cause 'No cause of Action', and its verdict for the Defendants on Defendants' counterclaim 'No Cause of action': each party to pay his own costs.

"It further appearing to the court that no judgment in accordance with said verdict has heretofore been entered and docketed, it is therefore hereby ordered that the foregoing judgment in said case be entered and docketed by the Clerk of this Court as of the—day of October, 1927.

"Dated at Chambers Nephi, Utah, this 17 day of February, 1928.

"District Court of Millard County, Utah. By Thos. H. Burton, Judge."

That was filed in the clerk's office the next day. While the document is designated "Judgment on verdict," yet it is no more

See 1 Freeman, Judgments, § 47 (5th ed. 1925). Cf. N. Y. Civ. Prac. Act § 495: "Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment in conformity to the verdict, unless a different direction is given by the court or it is otherwise specially prescribed by law. A motion for judgment upon a special verdict may be made by either party. A motion for judgment upon a verdict subject to the opinion of the court may be made by either party."

than an order for a judgment, or an order directing the clerk to enter and docket a judgment *nunc pro tunc*. It generally is held that an order for a judgment is itself not a judgment and that an appeal does not lie from it as a final judgment. 3 C. J. 1190; *Joint School Dist. No. 7 v. Kemen*, 68 Wis. 246, 32 N. W. 42; *Prothero v. Superior Court*, 196 Cal. 439, 238 P. 357; *Preston v. Hearst*, 54 Cal. 595; *Bruce v. Ackroyd*, 95 Conn. 167, 110 A. 835; *Stevens v. Solid, etc. Co.*, 7 Colo. 86, 1 P. 904. And it has been held here as elsewhere that an appeal will not lie until judgment has been entered in the proper record book, in the judgment book. *Yusky v. Chief Consol. Mining Co.*, 65 Utah 269, 236 P. 452; *Lukich v. Utah Const. Co.*, 46 Utah 317, 150 P. 298. Nor may it be said that, because of the Laws of 1925, p. 198, the judgment here was entered when it was signed by the judge and filed with the clerk. As heretofore shown, when trial is had by jury, the judge or court does not render or sign a judgment, but judgment must be entered by the clerk in conformity to the verdict. In a case tried to the court, and perhaps in some other instances, there is a distinction between the rendition of a judgment and the entry of it, where the one is a judicial act and the other a ministerial act.² In such case the rendition of the judgment precedes and is an essential prerequisite to entry. Such undoubtedly is what is meant by the language that the judgment shall be deemed entered when it is "signed by the judge and filed with the clerk." But that, as we think, has no application to a case tried to a jury and a verdict rendered by it. In such case there is no signing of a judgment by the judge or court and none contemplated or required by the statute, and no rendition of the judgment distinct from the entry of it, for in such case the clerk, without previous action or direction of the judge or court, is required to enter judgment in conformity to the verdict, and which in effect is simultaneously rendered and entered by the clerk and comes into existence and becomes effectual, not by any rendition or signing of the judgment by the judge or court, but by its entry by the clerk alone. *Old Settlers' Inv. Co. v. White*, 158 Cal. 236, 110 P. 922.

In the next place, what the judge or court here signed, and what was filed by the clerk, in effect was not a judgment. That

² Cf. *State ex rel. Reser v. District Court*, 53 Mont. 235, 238, 239, 163 P. 1149 (1917): "The proper functions of the clerk touching the entry of judgment are purely ministerial, and their valid exercise requires a judgment which has been actually pronounced by the court—not necessarily written and signed, or else a judgment pronounced by the law as a necessary consequence of the facts established—as in cases of default, verdict, etc.; but the instances wherein the clerk may even enter judgment without express direction or pronouncement by the court are of necessity confined to those wherein no discretion can be exercised as to the terms of the judgment. That the judgment at bar is not of this character is clear from what it contains as well as from what it omits."

the document which was signed and filed was denominated a "judgment on verdict" is of no controlling force. The more important question is, Is it in effect a judgment and is it final? *Sparrow v. Strong*, 4 Wall. 584, 18 L. Ed. 410. No particular form or words is essential to constitute a judgment, provided they are such as to indicate with reasonable certainty a final determination of the rights of the parties and the relief granted or denied.³ In order that the document be a judgment, it, among other things, must be sufficiently definite and certain to be susceptible of enforcement. It must specify the relief granted or denied or other determination of the action and a description of the parties for and against whom the judgment is rendered. As said in *Robinson v. Salt Lake City*, 37 Utah 520, 109 P. 817, it must at least state what the prevailing party shall receive and what the losing party is required to do, pay, or discharge, and adjudicate and dispose the matters in controversy. Here the so-called judgment on verdict is, first, a mere recital of the kind of verdict rendered by the jury. That is followed by a recital that no judgment in accordance with the verdict had been entered or docketed. Then it is ordered that "the foregoing judgment in said case be entered and docketed by the clerk" nunc pro tunc. What "foregoing judgment"? We do not see anything to which that phrase may apply except the verdict itself, which of course cannot be regarded as a judgment. *Kourbetis v. National Copper Bank*, 71 Utah 232, 264 P. 724. The document, the so-called judgment, does not determine or adjudicate anything, nor does it even attempt to do so. It does not specify any relief granted or denied, nor does it determine any of the rights of the parties. It does not order, adjudge or decree anything. It has not even the first essential requisite of a judgment. So, had what is here denominated "Judgment on Verdict" been entered in the judgment book or in the judgment docket, still the case would stand without a judgment terminating the litigation between the parties or disposing of the case on merits. In such respect it may here be said of the so-called judgment as was said of the denominated judgment in *Kourbetis v. National Copper Bank*, supra:

³ Cf. *Allegheny County v. Maryland Casualty Co.*, 132 F.2d 894, 897 (C.C.A. 3d 1943), certiorari denied 318 U.S. 787, 63 S. Ct. 981, 87 L. Ed. 1154: "If [a judgment] is a final judgment it terminates the controversy and either merges itself into or bars the plaintiff's claim. It thus itself becomes the generating source of new rights and liabilities of the parties. Under the constitution it is entitled to full faith and credit in every American jurisdiction. It may become a lien upon the losing party's land within the court's territorial jurisdiction and thus affect the title thereto. These considerations and many others which readily come to mind indicate the necessity of a final judgment being clear and unambiguous in its meaning and effect."

"It adds nothing whatsoever to the verdict of the jury, nor does it settle the controversy between the plaintiff and defendant bank. Neither party is awarded any judgment against the other, and nothing is ordered, adjudged, or decreed."

The conclusion is thus inevitable that the appeal must be dismissed and the cause remanded to the district court with leave to either party to cause to be entered a proper judgment in conformity to the verdict. Such is the order. Costs to the respondent.⁴

NOTE

Jones v. Jones, 136 Me. 238, 242, 8 A. 2d 141 (1939): Plaintiff, then Mrs. Hill, sued Hill for a divorce in February, 1938. The case was heard on April 6, 1938, and on that day the judge who heard it endorsed on the jacket containing the papers in the action:

"1938 April T 2 d Having had Divorce decreed for cause of cruel and abusive

"Custody of minor child to Libellant with right to Libellee to see him at all reasonable times."

The judge signed this endorsement in his official capacity. On April 7, the next day, plaintiff married defendant Jones. On April 18, 1938, the judge signed and filed a formal decree divorcing plaintiff from Hill and awarding her custody of their child in accordance with his memorandum of April 6. Plaintiff subsequently brought this proceeding in which she sought to have the validity of her marriage to Jones determined. The trial judge held that she was legally divorced from Hill on April 6 and that her marriage to Jones on April 7 was therefore valid. On appeal the court *sustained* Jones' exceptions, *holding* that plaintiff's divorce was not granted until April 18. The court said: "That herein which the appellee claims constituted a judgment or decree was simply a memorandum only for the benefit and future use of the justice, when at the end of the term, as is ordinary practice in this state, divorce decrees are signed and filed. His purpose whenever he signed it was not *then* to pronounce judgment. The affixture of his signature only verified it as the court's memorandum. It was sketchy and incomplete. It did not even state correctly the ground of divorce.⁵ The very fact that on the last day of the term the justice signed and filed a complete, accurately worded, and formal decree tends strongly to show that the court only then spoke in judgment and had not theretofore so spoken. If the memorandum had been intended by the court as a then pronouncement of his judgment, there was no necessity for a later decree."

⁴ Cf. G. Amsinck & Co. v. Springfield Grocer Co., 7 F. 2d 855 (C.C.A. 7th 1925).

⁵ The court's decree differed from the endorsement only in the following respects: It omitted the words "Having had," and inserted the word "treatment" after the words "cruel and abusive," the words "care and" before the word "custody," and the name of the child.

BUTT v. HERNDON

Supreme Court of Kansas, 1887. 36 Kan. 370, 13 P. 580.

On June 11, 1884, William Herndon filed his bill of particulars before a justice of the peace of Atchison county claiming from Jacob M. Smith, A. J. Morris, and O. W. Butt, late partners as Smith, Morris & Butt, \$60 for work and labor. . . . The justice, from the evidence in the case, decided that A. J. Morris and O. W. Butt were not indebted to the plaintiff; but found that Jacob M. Smith was indebted to the plaintiff in the sum of \$60, for work and labor. The judgment of the court was as follows:

"It is therefore considered and adjudged by me, R. B. Drury, justice of the peace, that the plaintiff, Wm. Herndon, do have and recover of and from defendant Jacob M. Smith the sum of sixty dollars, debt, and the costs of this action, taxed at \$48.65."

From this judgment the plaintiff filed an appeal undertaking, which was approved by the justice on September 27, 1884. On May 4, 1885 Morris and Butt filed in the district court the following motion, (court and title omitted:)

"Defendants O. W. Butt and A. J. Morris, here appearing for this purpose, move the court to dismiss the appeal proceedings and action, as above entitled, as now in this court, for reasons:

"1. No right to appeal as against said Butt and Morris ever existed." . . .

This motion, upon hearing, was overruled, Morris and Butt excepting. Trial May 7, 1885, by the court without a jury. After hearing the evidence and argument thereon, the court made and filed its conclusions of fact and of law, and rendered judgment in favor of the plaintiff and against the defendants O. W. Butt and A. J. Morris, as well as Jacob M. Smith, for the sum of \$60, together with all costs, and ordered execution to issue therefor. Morris and Butt excepted, and bring the case here.

HORTON, C. J.: When this case was called in the district court for trial, the defendant moved to dismiss the appeal, on the ground, among others, that there was no appealable judgment rendered in the court below. This motion was overruled, and is the principal error complained of. Section 120 of the justices act reads as follows:

"In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered."

A judgment is the final determination of the rights of the parties in an action. (Civil Code, § 395.) Accordingly, the judgment must be final—that is, it must settle the matter which it purports to conclude. The reasons announced by the court to sustain its judgment, strictly speaking, form no part of the judgment itself. The reasons or findings upon which a judgment is based are not *res adjudicata*, so as to bind the parties, unless a judgment is rendered. (Freeman on Judgments, 2d ed., § 2; *Burke v. Table Mountain Co.*, 12 Cal. 403; *Davidson v. Carroll*, 23 La. Ann. 108.)

The justice made the following findings:

“The court doth find from the evidence, that defendants A. J. Morris and O. W. Butt are not indebted unto plaintiff in any sum whatever; and doth further find that defendant Jacob M. Smith is indebted unto plaintiff in the sum of \$60 and that the same is for work and labor.”

The only judgment rendered in the case was as follows:

“It is therefore considered and adjudged by me, R. B. Drury, justice of the peace, that the plaintiff, William Herndon, do have and recover of and from defendant Jacob M. Smith the sum of \$60, debt, and the costs of this action, taxed at \$48.65.”

The justice made a general finding in writing in favor of Morris and Butt, but no judgment was entered upon this finding in favor of Morris and Butt, or against Herndon.¹ The matter was left by the justice pending and undetermined as to these parties. Generally, a written finding is made prior to the rendition of a judgment, but if a justice or a court orally announces its findings and renders judgment thereon, the omission of the finding is not substantial error. (*Leavenworth L. & G. R. Co. v. Comm'rs of Douglas Co.*, 18 Kan. 169.) If the action had been dismissed, or any other final judgment rendered against Herndon, an appeal could have been taken. (*Butcher v. Taylor*, 18 Kan. 558; *Moore v. Toennisson*, 28 Kan. 608.) As nothing but a finding was entered as between Herndon and Morris and Butt, and as no final judgment was rendered as between these parties, there was no foundation for the appeal. (Comp. Laws of 1879, ch. 81, § 20.)

Undoubtedly the justice would have rendered a final judgment as to these parties, if the attorney of Herndon had made a

¹ Cf. N.Y. Civ. Prac. Act § 476: “Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.”

formal request for him so to do. The omission perhaps was unintentional; but as no appeal can be taken except from a final judgment, the court erred upon the transcript before it in refusing to dismiss the alleged appeal, the unintentional omission of the justice to render judgment as between Herndon, Morris and Butt being fatal to an appeal.

The judgment of the district court will be reversed, and further proceedings will be had in accordance with the views herein expressed.

All the Justices concurring.²

NOTES

(1) *Lisle v. Rhea*, 9 Mo. 172 (1842): Trespass for taking by force certain personal property of plaintiff. The cause was submitted to the court sitting as a jury. The record on appeal stated that after hearing the evidence the court found for defendant, and it then contained this entry: "It is therefore considered by the court that the defendant recover of said plaintiff his costs, and charges by him in this behalf, laid out and expended, but that he have thereof execution." On appeal the cause was *dismissed* on the ground that no judgment had been entered up. "Judgment is here given the defendant for the costs of suit; but for any things here adjudged, the plaintiff is yet in court by no means hindered from proceeding in the cause. The judgment should have been thus entered: 'Therefore it is considered by the court, that the said plaintiff take nothing by her writ, &c.; and that the defendant go hence without day and recover against the said plaintiff his costs and charges, by him about his defence, &c.'"³

(2) *Bell Grocery Co. v. Booth*, 250 Ky. 21, 61 S. W. 2d 879 (1933): In a prior action the trial court's judgment read: "The court considering the proof and pleadings on file is of the opinion and so adjudges, that the partnership, the City Grocery Company, composed of Ross Booth and S. B. Burkhart, is and was indebted to the plaintiff, Bell Grocery Company, at the time of the filing of the suit herein, in the sum of \$1043.15, together with 6% interest from the 1st day of November, 1928, and the costs of this action." The court also adjudged that plaintiff was entitled to a lien in the amount of the judgment on certain property of Booth and Burkhart, which it had previously attached, and also on a lot of land which Booth had transferred to his wife in fraud of plaintiff. Booth and Burkhart executed supersedeas bonds with sureties "for the purpose of superseding" the judgment pending their appeal therefrom, and the execution of the judgment was stayed. Upon their appeal the judgment

² Cf. *St. Louis Amusement Co. v. Paramount Film Distributing Corporation*, 156 F.2d 400 (C.C.A. 8th 1946).

³ Cf. *People v. Severson*, 113 Ill. App. 496, 497 (1904): "The form of a final judgment for the defendant, whether upon verdict or upon demurrer to the declaration or replication, is, 'Therefore it is considered that the said (plaintiff) take nothing by his suit and that the said (defendant) do go thereof without day.'" See also *Town of Magnolia v. Kays*, 200 Ill. App. 122 (1916).

was affirmed. Plaintiff then brought this action upon the supersedeas bonds against Booth, Burkhart and their sureties. Plaintiff alleged, *inter alia*, that pending the appeal, the attached property had been dissipated and the lot of land sold. The trial court sustained defendants' demurrer to plaintiff's petition on the ground that the judgment in the first action was merely an opinion of the court since it did not "direct a recovery." Order dismissing plaintiff's petition *reversed*. (i) "It is true that the judgment which was superseded was not one quod recuperat; nevertheless it is a judgment. . . ." (ii) "And, after [the supersedeases] were issued and served, no further steps could be taken under it. No motion for a judgment to recover could be entered; no execution issued; and no suit filed on it." (iii) The amount of the judgment is recoverable on the supersedeas bonds, "notwithstanding it did not decree formally a recovery," and the trial court erred in holding the contrary.⁴

(3) *McNamara & Duncan v. Caban*, 21 Neb. 589, 33 N. W. 259 (1887): "The finding and judgment of the court were in words and figures as follows: 'After hearing the proof, it is the opinion of the court that the defendant, Anton Caban, is indebted to the plaintiff in the sum of \$100.00. It is therefore considered and adjudged by me that Anton Caban pay to the plaintiff, McNamara & Duncan, the sum of \$100.00 with interest from Dec. 20, 1883, and costs of this suit taxed at \$3.15. Jacob B. Sharot, Co. Judge.' A transcript of the judgment was filed in the district court which issued an execution thereon. The district court subsequently granted defendant's motion to quash the execution on the ground that no judgment had been entered in the cause. *Reversed*. While the form of the judgment is inappropriate in an action at law, it "determines the amount due from the defendant to the plaintiff, and requires him to pay the same; and this, though informal, in a collateral proceeding, we must hold, under the definition of a judgment given by the code [namely, 'the final determination of the rights of the parties in an action'], to be a judgment."⁵

SECTION 2. DEVICES FOR ENFORCING A JUDGMENT

FREEMAN, EXECUTIONS

3d ed. 1900. i, § 1.*

Theoretically a judgment is the end of the law. It permanently settles disputed issues of fact and applies to the facts as thus settled established principles of law. It declares the respective obligations of the litigants in regard to the matters which

⁴ Note the form of the judgment in *Pavlis v. Atlas-Imperial Diesel Engine Co.*, Note (1), *supra* p. 23. Cf. *Needham v. Gillaspay*, 49 Ind. 245, 247 (1874): "To constitute a valid judgment, the word 'recover' should be used, and the amount of the recovery should be stated, where a money judgment is rendered, and in other cases, appropriate words should be used, having reference to the relief granted."

⁵ Cf. *Hentig v. Johnson*, 8 Cal. App. 221, 96 P. 390 (1908).

* By permission of Bancroft-Whitney Company, the publisher.

they have chosen to submit to the decision of the court. Practically, a judgment may be as far from the end as it is from the beginning of the law. The declaration of a right or the permanent and unalterable establishment of an obligation can of itself have no practical force, except as it operates on the private or public conscience; and, unfortunately, people who have engaged in a long and perhaps bitter litigation are likely to emerge with consciences so dulled toward each other that they will respond to nothing less than the practical forcing power of the law. Even where this state of mind has not been produced, the losing party, through his inability to discharge the established obligation, may make it indispensable to call in aid the final process of the law. Every step taken from the issue of this process is liable to be attended with legal embarrassments of the most perplexing nature and to lead to litigation more persistent and more complicated than that upon which the process was based.¹

The writ which authorizes the sheriff or other officer either to enforce a judgment at law or to endeavor to produce a satisfaction thereof is called an execution. Every writ which authorizes an officer to carry into effect a judgment is an execution. . . .

LANGDELL, EQUITY JURISDICTION

2d ed. 1908. 24-26.*

A court of common law never lays a command upon a litigant nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former, the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff.

¹ As, for example, in *Charlotte Barber Supply Co. v. Branham*, *Note* (3), *supra* p. 23.

* By permission of Harvard Law Review Association, the publisher.

By the latter, the defendant's title to the property seized is transferred to the plaintiff, or his title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession on the ground that the property belongs to the plaintiff, and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for the recovery of money the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judgment; but his body is taken (as his property is) in satisfaction of the judgment. . . .

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court in equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they could not touch their bodies nor their

property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them into the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de excommunicato capiendo*) and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such* done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of the common law; for the former is strong at the very points where the latter is weak.

FREEMAN, EXECUTIONS

3d ed. 1900. i, § 8a.*

In equity jurisprudence, as modified by statute in England and many of the states, certain classes of decrees are self-executing, and need no writ or proceeding for their enforcement, as where a decree operates to transfer title from one party and vest it in another. Where a decree is not self-executing, it in effect commands the defendant to do or not to do some act or acts specifically designated by such decree. Formerly the court did not undertake to do, or even to cause its officers to do, the

* By permission of Bancroft-Whitney Company, the publisher. The author's footnotes have been omitted.

acts which it had commanded to be done. It accomplished its purposes by such a course of proceeding toward and with the defendant and his property that a proper regard for his own interests led him to conform to its idea of equity as expressed in the decree. At the present time, when the acts which the defendant is required to do are of such a nature that another may do them for him, the court usually authorizes its master, commissioner or other officer to execute the decree for and as the act of the defendant. This authorization is sanctioned by statute in most of the states. . . .

When the coercive powers of the court of chancery were sought to be invoked, the first step of the complainant was to procure the issuing and service of a writ of execution. This was a mandate under the great seal, commanding the defendant to do the acts required of him by the decree. This writ is now obsolete. Instead of procuring its issuance, the complainant now obtains a copy of the decree and serves it upon the defendant, who thereupon becomes bound to comply therewith. . . . After the copy of the decree has been duly served, and the time limited for compliance therewith has expired without such compliance, the complainant is entitled to a writ of attachment. This writ is directed to the sheriff or some other competent officer of the jurisdiction in which the defendant is likely to be found, requiring him to attach the body of such defendant and have him before the court at a time designated, to answer for the alleged contempt. Under this writ the defendant may be arrested and lodged in prison, and suffered to remain there until he has purged himself of his contempt by obedience to the decree. . . .

If the defendant cannot be found, a return of non est inventus is made. Upon this return, when the defendant can not be found, or upon showing that he is in prison, obstinate and disobedient, where he has been found, a writ or commission of sequestration may issue. This writ is directed to certain persons therein named (usually four), and empowers them to enter upon the real estate of the disobedient person, "and to receive, sequesterate, and take the rents and profits thereof and also his personal estate, and keep the same under sequestration in their hands while he shall have performed the act required and cleared his contempt." . . . If it becomes necessary or advisable for the sequestrators to sell personal effects seized by them, such sale will be authorized by the court on proper application therefor.

. . . If, when a commission issued to sequestrators, or others, under which it was necessary for them to take possession of real property, they were unable to otherwise obtain possession,

a writ of assistance issued in their aid. Where the surrender of the possession of lands to a complainant or other person was ordered or decreed, this writ also issued It is directed to the sheriff of the county wherein the lands lie, and commands him to put plaintiff into possession pursuant to the decree. . . .

NOTE

The devices for, the rules regulating, and the practical and legal obstacles to, the enforcement of judgments are further considered in Civil Procedure II, and in the Equity, Creditors' Rights and other substantive courses. They are discussed in King, *The Enforcement of Money Judgments in California*, 11 So. Calif. L. Rev. 215 (1938); Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Col. L. Rev. 1007 (1935), *Collection of Money Judgments in New York: Third Party Orders*, 35 id. 1167 (1935), *Collection of Money Judgments: Experimentation with Supplementary Proceedings*, 36 id. 1061 (1936); Evans, *Problems in the Enforcement of Federal Judgments*, 4 Mo. L. Rev. 19 (1939); Lunn, *Modernize the Process for Enforcement of Judgments*, 22 A. B. A. J. 276 (1936).

Chapter III

JUSTICIABILITY

SECTION 1. THE CONDITIONS OF JUSTICIABILITY

FRENCH v. JEFFRIES

Circuit Court of Appeals of the United States, Seventh Circuit, 1945.
149 F. 2d 555.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; Philip L. Sullivan, Judge.

Suit by Harper French against Nellie Jeffries and others to collect plaintiff's alleged interest in the estate of William Jeffries, deceased, wherein named defendant filed counter complaint claiming the ownership of the property of which deceased died seized. From a judgment against plaintiff on his complaint and against named defendant on her counter complaint, named defendant appeals.

Case dismissed for want of jurisdiction.

MINTON, CIRCUIT JUDGE. William Jeffries, a resident of Cook County, Illinois, died October 7, 1941, intestate. He left surviving him a widow, Nellie Jeffries, and an adopted son, William Jeffries, Jr. While the estate was in the process of settlement and in litigation in the state courts, one Harper French, a gambler who had not worked for twenty-five years, filed a suit in the United States District Court for the Northern District of Illinois against Nellie Jeffries, William Jeffries, Jr., Charles R. Aiken, Administrator to Collect of the Estate of William Jeffries, Deceased, and others, in which the plaintiff claimed an interest in an estate real and personal, of William Jeffries, Sr., alleged to be of the value of \$100,000.

The evidence shows that Harper French never had any cause of action of any kind. Bruseaux, a colored detective, and Nellie Jeffries, the widow of William Jeffries, Sr., deceased, asked French to come from Detroit to Chicago and report to them at Nellie Jeffries' home. She met him at the door and told him he was supposed to be the brother of William Jeffries, Sr., and she introduced him to two women present at that time as the brother of the deceased. She made arrangements for French to meet her at Bruseaux' office in Chicago the next day. French reported there as directed. Bruseaux and Nellie Jeffries were there, and again told him he was supposed to be the brother of

the deceased and she and Bruseaux "schooled him" on how to play his part. Then they called a colored lawyer, and it was agreed among the three, Bruseaux, Nellie Jeffries, and the lawyer, that each would give French \$500.00. After so informing French, they produced papers for him to sign which he did without reading them. After he signed the papers, Bruseaux told him to go to Detroit and "Don't have nothin' to do with nobody 'til I send for you." French was given \$25.00 by Bruseaux and Nellie Jeffries to pay his expenses from Detroit.

French went back to Detroit and the lawyer filed a suit in the United States District Court of the Northern District of Illinois with Harper French as plaintiff as before stated. In this complaint, in addition to alleging that he was the half brother of William Jeffries, Sr., French alleged that he had given William Jeffries, Sr., in his lifetime \$3,000 with which to purchase some property so that Jeffries could act as a paid bondsman. The property was to be held in trust for French and he was to have a half interest in all the properties deceased purchased out of his profits as a bondsman; the deceased died the owner of property allegedly valued at \$100,000. It was also alleged that the attempt of William Jeffries, Sr. to adopt William Jeffries, Jr. was void. It was necessary to establish that the deceased had no children in order that French might become an heir of the deceased.

Nellie Jeffries answered the complaint, admitting that French was a citizen of Michigan, and she filed a counter complaint in which she alleged she was the owner of the property of which deceased died seized and admitting all the allegations that French made concerning the invalidity of the proceedings for the adoption of William Jeffries, Jr.

The matter was referred to a Master. French was produced before the Master by the attorney for William Jeffries, Jr., who was also the Administrator of the estate of William Jeffries, Sr. Under oath French emphatically denied he was the half brother of William Jeffries, Sr. and that he had any interest in any of the property of which Jeffries died seized, or of which he was the owner. He denied that he ever gave William Jeffries, Sr. \$3,000 with which to purchase any real estate and said that the claim which he asserted in his complaint was not true and never existed in fact. The Master found that:

" . . . Harper French had confessed his complicity in the scheme to defraud the estate. . . ."

The Master in his preliminary report, speaking of the witness, French, said:

“ . . . Although obviously the witness is a man of little formal education and by his own admission has been a professional gambler most of his life, he manifested a remarkable memory as to details, persons and events, as well as a keen and discerning understanding of his present predicament and of his part in the institution and prosecution of this suit. The Master was impressed by the witness' forthright attitude and by his candor in admitting the role he played in the attempted fraudulent assault upon the estate.”

The Master and the court both found that there was jurisdiction. The question of jurisdiction was raised at the trial, in the briefs, and on the oral argument. That the question of jurisdiction was present in the minds of the Master and the attorneys is apparent from the record. At the conclusion of the first testimony taken, which was that of the plaintiff Harper French, counsel for Nellie Jeffries, who was not her attorney at the time of the fraudulent acts described above, insisted on dismissal of the complaint for want of jurisdiction. The Master observed:

“The Master, you know, lives by his fees here. What assurance am I going to have to get my fees? The plaintiff is abandoning his complaint and the cross-complainant is debating whether he would like to or not.”¹

After receiving assurances from the Administrator that the Master's fees would be paid, he proceeded. Then the attorneys for the parties attempted to stipulate that they would waive the question of jurisdiction and not raise it again. It hardly needs the citation of authority to support the proposition that the parties cannot stipulate to waive jurisdiction or by their consent can (sic) confer jurisdiction. *Hayden v. Manning*, 106 U. S. 586, 1 S. Ct. 617, 27 L. Ed. 306; *McEldowney v. Card*, C. C. Tenn., 193 F. 475; *Writ of Error Dismissed*, 6 Cir., 213 F. 1020. The Master proceeded to consider the case on its merits and to file his report to the District Court which was approved, and the District Court considered the case on its merits and found against French on his complaint and Nellie Jeffries on her countercomplaint. Nellie Jeffries appealed.

We think there is some evidence in the record that French was a resident and citizen of Detroit, Michigan, but the claim asserted by French was a fraud and had no existence whatever in fact. He had no claim of any kind against anyone he sued. French had been promised \$1,500 for his part in the fake law suit, and when he didn't get it, he talked. The case just did not

¹ Both attorney for the plaintiff and attorney for the counterclaimant made motions to dismiss the complaint and the countercomplaint.

exist, and was filed fraudulently, the result of the scheme to defraud the estate of William Jeffries, Sr.

The suit did not “. . . really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . .” as required by statute. 28 U. S. C. A. § 80.² Not only was the case fraudulently filed, it was collusively filed for the purpose of conferring jurisdiction. This is apparent from the fact that the claim was asserted for at least \$3,000.³ Such conduct prevents jurisdiction from ever attaching. 28 U. S. C. A. § 80. It was a fraud on the court. *Lehigh Mining & Manufacturing Co. v. Kelly*, 160 U. S. 327, 339, 16 S. Ct. 307, 40 L. Ed. 444.

Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such a claim is incapable of supporting the jurisdiction of the court. *Horst v. Merkley*, C. C. Cal., 59 F. 502. See also *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845.

The Master found that Nellie Jeffries, the countercomplainant, had admitted in her answer that:

“If the plaintiff (French) did advance \$3,000 to William Jeffries, Sr. as alleged in the amended complaint, it was a loan. . . .”

She further alleged:

“. . . that all of the said real estate was purchased by monies earned by (Nellie Jeffries) and she became and was the sole owner of all the property, but permitted William Jeffries, Sr. to hold title for the purpose of signing bonds.”

In her sworn countercomplaint, Nellie Jeffries swore:

“. . . Countercomplainant (Nellie Jeffries) states that on or about January 26, 1922, she furnished to William Jeffries, Sr., the sum of, to-wit: Two Thousand (\$2,000.00) Dollars of her own savings, and Three Thousand (\$3,000.00) Dollars *loaned her by Harper French, plaintiff*, with which to purchase a deed to the property. . . .”

This is the same Nellie Jeffries who conspired with Bruseaux to get French to file this fake suit. No allegations or

² This statute provides: “If in any suit commenced in a district court . . . it shall appear to the satisfaction of the said district court . . . , that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, . . . the said district court shall proceed no further therein, but shall dismiss the suit”

³ 28 U.S.C.A. § 41 provides: “The district courts shall have original jurisdiction as follows: (1) First, of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and . . . (b) is between citizens of different states”

admissions that she might make could possibly aid the court's jurisdiction as to amount. She is a part of the fraud. That fraudulent suit involved no dispute or controversy between the purported plaintiff and the purported defendants. If there was any dispute or controversy, it existed between citizens of Illinois only. That fraudulent suit was incapable of affording jurisdiction to the District Court.

When the Master and the District Court saw that it was a fake suit, it was the Master's duty to recommend dismissal, and the court's duty to dismiss the case. Not only did they not dismiss it, they prolonged it after the parties themselves, both attorneys for the plaintiff French and the countercomplainant Nellie Jeffries, had moved to dismiss the complaint and the countercomplaint.

When it shall appear at any time that a suit in the District Court does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, it should dismiss the case and proceed no further. It is our duty, where the District Court so fails to dismiss for want of jurisdiction and proceeds to dismiss on the merits, to dismiss the case, even though the question of jurisdiction was not raised in the court below or on appeal. *Weyman-Bruton Co. v. Ladd*, 8 Cir., 231 F. 898.

The case is dismissed for want of jurisdiction.

KERNER, CIRCUIT JUDGE, concurs in the result.

NOTE

Reynolds v. Van Culin, 36 Haw. 556 (1943): Plaintiff and defendant were associated in business, both, apparently, being employees of one Kaufman. Plaintiff and his wife, Avis, were passengers in an automobile owned by Kaufman and driven by defendant when it collided with another automobile, and plaintiff and his wife were injured. On February 5, 1940, he brought suit against defendant, alleging that the collision was due to the latter's negligence. On July 15, 1940, plaintiff wrote defendant: "I want to remind you again that we do not propose to look to you for the satisfaction of any judgment. The only way that we can proceed against the insurance company under the Kaufman policy is to sue you, obtain judgment and then sue the insurance company under the policy, alleging and proving that you were driving the car for the Kaufman's (sic) at the time Avis and I got hurt." At the trial defendant introduced this letter in evidence and then moved to dismiss the action as collusive and fictitious. His motion was denied and plaintiff recovered judgment. *Affirmed*. (i) The action was not collusive. "No agreement, secret or otherwise, of any character, between the plaintiff and defendant is disclosed by the letter or otherwise shown." (ii) The action was not fictitious. In *Fitzjarrell*

v. Boyd, 123 Md. 497, 91 A. 547 (1914) the court apparently held that the plaintiff's intention not to enforce any judgment against the defendant was not decisive and did not render the action fictitious or collusive, even though the result would necessarily affect the interest of a third person who was not a party of record. "The record before us does not disclose the terms of the Kaufman policy nor does it disclose whether or not the company issuing the policy was given notice of the suit and called upon to defend it.⁴ That being true, we are unable to say and refrain from deciding whether or not the judgment against the defendant will be of any force or effect in a suit by the plaintiff against the company issuing the policy or affect or settle the rights or liabilities of third persons who are not parties to the case at bar."⁵

UNITED STATES v. JOHNSON

Supreme Court of the United States, 1943.
319 U.S. 302, 63 S. Ct. 1075, 87 L. Ed. 1413.

Appeal from the dismissal of a complaint in a suit in which the United States had intervened and in which the District Court held unconstitutional the Emergency Price Control Act of 1942.

PER CURIAM. One Roach, a tenant of residential property belonging to appellee brought this suit in the district court alleging that the property was within a "defense rental area" established by the Price Administrator pursuant to §§ 2 (b) and 302 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23; that the Administrator had promulgated Maximum Rent Regulation No. 8 for the area; and that the rent paid by Roach and collected by appellee was in excess of the maximum fixed by the regulation. The complaint demanded judgment for treble damages and reasonable attorney's fees, as prescribed by § 205 (e) of the Act. The United States, intervening pursuant to 28 U. S. C. § 401,¹ filed a brief in support of the constitutionality of the Act, which appellee had challenged by motion to dismiss. The district court dismissed the complaint on the ground—as appears from its opinion (48 F. Supp. 833) and judgment—that

⁴ Cf. 8 Appleman, Insurance Law and Practice, § 4860 (1942): "Ordinarily, a liability insurer is bound by the result of the litigation against the insured, provided it had notice of such litigation and an opportunity to control its proceedings. . . . The original judgment [in an action by the injured person against the insurer] would be conclusive only in respect to matters necessarily adjudged therein."

⁵ Cf. *Corum v. Hartford Accident & Indemnity Co.*, 67 Cal. App. 2d 891, 155 P.2d 710 (1945).

¹ This statute provides that whenever the constitutionality of an Act of Congress affecting the public interest is questioned in any court of the United States in any suit or proceeding to which neither the United States nor any of its agencies or officers is a party, the court shall certify that fact to the Attorney General and permit the United States to intervene in and become a party to the suit or proceeding for the presentation of evidence and argument upon the question of constitutionality.

the Act and the promulgation of the regulation under it were unconstitutional because Congress by the Act had unconstitutionally delegated legislative power to the Administrator.

Before entry of the order dismissing the complaint, the Government moved to reopen the case on the ground that it was collusive and did not involve a real case or controversy. This motion was denied. The Government brings the case here on appeal under § 2 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 349a,² and assigns as error both the ruling of the district court on the constitutionality of the Act, and its refusal to reopen and dismiss the case as collusive. . . .

The affidavit of the plaintiff, submitted by the Government on its motion to dismiss the suit as collusive, shows without contradiction that he brought the present proceeding in a fictitious name; that it was instituted as a "friendly suit" at appellee's request; that the plaintiff did not employ, pay, or even meet, the attorney who appeared of record in his behalf; that he had no knowledge who paid the \$15 filing fee in the district court, but was assured by appellee that as plaintiff he would incur no expense in bringing the suit; that he did not read the complaint which was filed in his name as plaintiff; that in his conferences with the appellee and appellee's attorney of record, nothing was said concerning treble damages and he had no knowledge of the amount of the judgment prayed until he read of it in a local newspaper.

Appellee's counter-affidavit did not deny these allegations. It admitted that appellee's attorney had undertaken to procure an attorney to represent the plaintiff and had assured the plaintiff that his presence in court during the trial of the cause would not be necessary. It appears from the district court's opinion that no brief was filed on the plaintiff's behalf in that court.

The Government does not contend that, as a result of this coöperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action. Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of

² This statute provides that in any suit or proceeding in a United States court to which the United States is or has intervened as a party and in which the decision is against the constitutionality of an Act of Congress, an appeal may be taken directly to the Supreme Court by the United States or any other party.

the suit by payment of the fees of both.³ *Gardner v. Goodyear Dental Vulcanite Co.*, 131 U. S. Appendix, ciii.

Here an important public interest is at stake—the validity of an Act of Congress having far-reaching effects on the public welfare in one of the most critical periods in the history of the country. That interest has been adjudicated in a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne. He has been only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen. Such a suit is collusive because it is not in any real sense adversary. It does not assume the "honest and actual antagonistic assertion of rights" to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345, 12 S. Ct. 400, 36 L. Ed. 176; and see *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black 419; *Bartemeyer v. Iowa*, 18 Wall. 129, 134-35; *Ather-ton Mills v. Johnston*, 259 U. S. 13, 15, 42 S. Ct. 422, 66 L. Ed. 814. Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them. The district court should have granted the Government's motion to dismiss the suit as collusive. We accordingly vacate the judgment below with instructions to the district court to dismiss the cause on that ground alone. Under the statute, 28 U. S. C. § 401, the Government is liable for costs which may be taxed as in a suit between private litigants; costs in this Court will be taxed against ap-pellee.

So ordered.

NOTE

Lord v. Veazie, 8 How. 251, 255, 12 L.Ed. 1067 (U. S. 1850): "The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of

³ Cf. *City and County of San Francisco v. Boyd*, 22 Cal. 2d 685, 140 P.2d 666 (1943), in which the court said: "This does not apply, however, where, as here, the adversary parties are a municipal corporation and one of its officers . . . since the common source of such payment does not give one party control over the preparation and argument of the cause."

right. And in a case of that kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, with[out] incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

PROBLEMS

1. What does it mean to say that a controversy is justiciable?

2. According to *French v. Jeffries and United States v. Johnson*, what characteristic must a controversy possess in order to be justiciable?

3. Ought it to be a condition of the justiciability of a controversy that it possess this characteristic and, if so, for what reasons?

PRICE v. WILSON

The Municipal Court of Appeals for the District of Columbia, 1943. 32 A.2d 109.

CAYTON, ASSOCIATE JUDGE. Plaintiffs sued for possession of dwelling house property. The case was tried to a jury and a verdict for plaintiffs resulted. From the judgment on said verdict, defendant appealed. He furnished a supersedeas bond. While the appeal was pending and before argument defendant removed from the premises and plaintiffs took over possession. Because of that situation, appellees have pressed for a dismissal of this appeal.

There is thus presented the primary question as to whether there is anything for us to decide on this appeal or whether the question has become moot because defendant has surrendered possession to plaintiffs.

The applicable law was clearly stated many years ago by the Supreme Court in *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 133, 40 L. Ed. 293: "The duty of this court, as of every

other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.”¹

This language was quoted with approval in *State of Tennessee ex rel. Maloney v. Condon*, 189 U. S. 64, 23 S. Ct. 579, 47 L. Ed. 709. [Other citations omitted.]

Applying the rule to this case we find this situation: The trial court by its judgment required defendant to yield possession to the plaintiffs. He appealed and filed a supersedeas bond. The filing and approval of that bond suspended the operation of the judgment and entitled him to remain in possession until after the disposition of this appeal. But he elected to vacate the premises and plaintiffs have resumed possession. That constituted a voluntary removal and a compliance with the judgment. It makes plaintiff's possession a fait accompli and leaves the appeal in such condition that there is no effective action that we can take either by affirmance or reversal.

If we were to affirm we would be approving the decision of the trial court that plaintiffs be restored to possession. But the tenant has already approved it himself by removing from the property and abandoning possession to plaintiffs.

If we should reverse, the effect would be that plaintiffs should not have possession; whereas their opponent in the litigation has already voluntarily given them that possession. Or, if we should remand for a new trial there would be no issue to try, for plaintiffs already have the possession they have sought.

Thus any attempt on our part to adjudicate the merits of the appeal would be merely to record our views concerning a controversy which no longer exists and to rule on a question which has become moot and purely academic. This is no mere technicality. It goes to the very foundation of the appeal.

Appeal dismissed.²

¹ Cf. *Reynolds v. Vroom*, 130 Conn. 512, 515-516, 36 A.2d 22 (1944): "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. *State ex rel. Foote v. Bartholomew*, 106 Conn. 698, 701, 138 A. 787. The question may be made moot by the act of the court from which the appeal is taken, as where pending an appeal some judgment or order rendered or made in the cause renders the determination of the questions presented by the appeal unnecessary. Likewise it may arise from the act of another court or judge. 4 C.J.S. 120. 'So, as no practical benefit could follow from the determination of the questions sought to be raised by the appeal, it is not incumbent upon us to decide them.' *Rollins v. Holcomb*, 122 Conn. 664, 666, 190 A. 260."

² Cf. *Diprete v. Vallone*, 70 R.I. 286, 38 A.2d 769 (1944). For other recent instances of controversies held to be moot, see *State ex rel. v. Jones*, 61 Wyo. 350,

NOTE

In re Kaeppler, 7 N. D. 307, 308-309, 75 N. W. 253 (1898): A bank instituted insolvency proceedings under a state statute against Kaeppler who contested the proceedings. After a trial the court found in Kaeppler's favor and dismissed the proceedings. Thereafter Kaeppler was adjudged an insolvent upon his own petition. The bank then appealed from the judgment in the involuntary proceedings. Appeal *dismissed*. "It is obvious that the appellant can secure in the voluntary proceedings everything to which it would be entitled should we reverse the judgment appealed from, and direct the District Court to render judgment in its favor. . . . It is therefore prosecuting this appeal not to secure any decision which can be of any benefit to it on the merits. The case is strictly analogous to those cases in which there is no longer any practical controversy between the parties; as, for instance, where, pending an appeal in an action to recover possession of a public office, the term for which the plaintiff was elected has expired. In such cases and in all similar cases the appellate court will dismiss the appeal on the ground that judicial tribunals are not organized for the purpose of rendering decisions which can be of no possible advantage to the parties to the litigation."

COLE v. CHIEF OF POLICE OF FALL RIVER

Supreme Judicial Court of Massachusetts, 1942. 312 Mass. 523, 45 N.E.2d 400.

Bill in Equity, filed in the Superior Court on June 4, 1942.

The suit was heard by Williams, J., upon a case stated. Final decrees dismissing the bill were entered on July 27, 1942. The plaintiff appealed. . . .

RONAN, J. The plaintiff, a candidate for the office of representative in Congress from the Fourteenth Congressional District of Massachusetts, equipped an automobile and trailer, both registered in his name, with signs directing attention to the record of his opponent and informing the public that he was a candidate for the office. The trailer carried a large board, approximately fifteen feet long and seven feet wide, on each of the two faces of which was a sign attacking the public record of his opponent. The automobile bore a sign approximately four feet long and three feet high which announced the candidacy of the plaintiff and referred to his opponent as an ex-congressman. On the morning of May 30, 1942, while the automobile and trailer were being operated along a public street in Fall River by an agent of the plaintiff, the said agent was in-

157 P.2d 993 (1945); State ex rel. v. Boniecki, 223 Ind. 416, 61 N.E.2d 176 (1945); Chicago City Bank & Trust Co. v. Board of Education, 386 Ill. 508, 54 N.E.2d 498 (1944); Spreckels Sugar Co. v. Wickard, 131 F.2d 12, 75 App. D.C. 44 (1941); State ex rel. v. Brown, 216 Minn. 135, 12 N.W.2d 180 (1943); Donato v. Board of Barber Examiners, 56 Cal. App. 2d 916, 133 P.2d 490 (1943).

formed by the defendant Verville, a captain in the police department of Fall River, that he was violating the law and, subsequently, the defendant Violette, chief of police, informed the plaintiff that he intended to enforce against him an ordinance which provided that "No person shall operate or park a vehicle on any street or highway for the primary purpose of displaying advertising signs." The plaintiff then filed this bill in equity against the chief of police, a police captain, the police board of the city of Fall River created by St. 1894, c. 351, and the mayor. The bill, with the consent of the parties, was dismissed as to the mayor. The remaining defendants intend to enforce the ordinance above mentioned and various other ordinances governing traffic on the streets of Fall River, and also the rules and regulations adopted by the State department of public works, division of highways, by virtue of G. L. (Ter. Ed.) c. 93, § 29, for the control and restriction of billboards, signs and other advertising devices. The plaintiff has appealed from a final decree dismissing the bill.

When the case was reached for argument in this court on November 10, 1942, it was properly represented by an affidavit filed by the defendants that the plaintiff had been defeated in the primary election of his party held on September 15, 1942, and that the successful candidate at this primary of the political party of which the plaintiff was a member was defeated at the election held on November 3, 1942, by the candidate of the opposing party. The plaintiff on the other hand has filed an affidavit stating that he intends to use upon the streets of Fall River in another political campaign this equipment with different messages upon it.¹

The aim of the bill is a permanent injunction, restraining the defendants from interfering with the operation of the plaintiff's automobile and trailer bearing the signs described in the bill upon the streets of Fall River. The occasion for the use of such signs has passed and there is now no actual controversy based upon any factual foundation existing between the parties. While there still may be a difference of opinion as to the validity of the ordinances in question, there is no longer any present clash of contending rights. Parties are not entitled to de-

¹ Plaintiff stated in his affidavit: "The fact that he has carried on this case after the primary is proof of plaintiff's intention to continue to use signs as aforesaid in the future. . . . That this very same case will almost immediately be started on its way to this court again, is practically certain, as opposing parties have expressed their intention to carry on as they did, namely, the police chief to enforce the ordinance and the plaintiff to violate it and challenge its constitutionality in court. A decision of the court now will prevent a recurrence of the conflict with Fall River police authorities, and will save plaintiff from the handicap of again losing many months campaigning time in Fall River with said sign."

cisions upon abstract propositions of law unrelated to some live controversy. *United States v. Appalachian Electric Power Co.* 311 U. S. 377, 61 S. Ct. 291, 85 L. Ed. 243. *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154. This rule applies with special force where an adjudication is sought upon the constitutionality of some statute or ordinance as "it is almost the undeviating rule of the courts, both state and Federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court." *Baker v. Grice*, 169 U. S. 284, 292, 18 S. Ct. 323, 42 L. Ed. 748. *Arkansas Fuel Oil Co. v. Louisiana*, 304 U. S. 197, 58 S. Ct. 832, 82 L. Ed. 1287. *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586. *Land v. Wilson*, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281. The possibility that the same issue might arise in the future and that it might be advantageous for the parties to have their rights determined in advance is not enough to call for the rendition of a judgment, which the future might show was of little practical value and merely settled a matter that had become no more than a theoretical dispute. The questions raised by the bill have become moot. *Sullivan v. Secretary of the Commonwealth*, 233 Mass. 543, 124 N. E. 422. *Brown v. City Council of Cambridge*, 289 Mass. 333, 194 N. E. 88. *Hubrite Informal Frocks, Inc. v. Kramer*, 297 Mass. 530, 9 N. E. 2d 570. *Nilsson v. Pearson*, 301 Mass. 228, 16 N. E. 2d 658. *Simon v. Schwachman*, 301 Mass. 573, 18 N. E. 2d 1. *Russell v. Secretary of the Commonwealth*, 304 Mass. 181, 23 N. E. 2d 408. *Anderson v. Labor Relations Commission*, 310 Mass. 523, 38 N. E. 2d 929.

The final decree, in the opinion of a majority of the court, is to be modified by the insertion of a clause to the effect that the bill is dismissed on the ground that the questions raised have become moot and the decree as so modified is affirmed with costs. *Swampscott v. Knowlton Arms, Inc.*, 272 Mass. 475, 172 N. E. 601. *Nilsson v. Pearson*, 301 Mass. 228, 16 N. E. 2d 658.

Ordered accordingly.

NOTES

(1) *St. Pierre v. United States*, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943): Petitioner was sentenced to five months' imprisonment by the District Court for contempt of court because of his refusal to answer a question put to him as a witness during the course of a grand jury investigation. The Circuit Court of Appeals affirmed the judgment and the Supreme Court granted certiorari. However, before it did so, petitioner had fully served his sentence. In the order granting the writ the court therefore requested counsel to discuss the question whether

the case had become moot and, after argument, *dismissed* the writ on that ground, although the Government admitted that it intended to call petitioner before the grand jury again and, if he persisted in his refusal to answer the question previously put to him, to ask that he be committed until he should answer it. The court said: "We are of the opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. [Citations omitted] The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied. In these respects the case differs from that of an injunction whose command continues to operate *in futuro* even though obeyed. Federal Trade Commission v. Goodyear Co., 304 U. S. 257, 260, 58 S. Ct. 863, 82 L. Ed. 1326, and cases cited."

(2) *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372 (1944): At a primary election held in August, 1943, relator lost the nomination for a county office by a single vote. Having learned of serious irregularities in the conduct of the election, he sought, in accordance with the local statute, to examine the ballot boxes but the circuit clerk, who was their custodian, denied him access to them. Thereupon, the district attorney filed a petition for a writ of mandamus against the clerk to compel him to permit the relator to examine the ballots and, after a hearing, the circuit judge granted the writ but allowed the clerk an appeal with a supersedeas, and before his appeal was heard the general election had been held. The court therefore, *ex mero motu*, raised the question whether the case had become moot, and in that connection said: "In the first place, we do not know what an examination of the three boxes will disclose. It may be that the contents will show that the relator was in fact entitled to the nomination, and what rights this would give him, if any, we ought not to decide without a record of what the full facts are,—unless we are prepared to say that manifestly and in any possible event relator has no further rights in the premises. There being no brief on that question, we decline to enter upon it; but rather for the reasons next to be stated, we lay aside that phase of the matter.

"While it is well established in this state, as well as elsewhere, that as a general rule an appeal will be dismissed when no useful purpose could be accomplished by entertaining it, when so far as concerns any practical ends to be served the decision upon the legal questions involved would be merely academic, it has, on the other hand, been broadly stated that the rule will not be applied when the question or questions involved are matters affecting the public interest. 3 Am. Jur. p. 310. That statement is made more accurate, however, by the further statement that there is an exception to the general rule as respects moot cases,

when the question concerns a matter of such a nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct. See, text and authorities 4 C. J. S., Appeal and Error, § 1354, pp. 1945-1947, note 24, and 38 C. J. p. 949, note 66. The exception is of a compelling propriety in the present instance, for if we were to dismiss this appeal without disposing of the legal questions here involved and without declaring the rule of law which must be observed, and doing nothing for its enforcement, the way would thereby be made plain to corrupt politics by which to work a practical repeal of our Corrupt Practices Act, and by which the evils which existed before its passage could be revived, and that way would be simply to follow the course taken in the facts disclosed by the present record.

"The judgment of the trial court ordered the respondent clerk to permit the examination at any time up to and including September 15, 1943. That date having passed, we affirm the judgment with the modification that the examination shall be allowed upon the statutory notice at any time within twelve days from and after the filing of the mandate of this court in the court below."²

PROBLEMS

1. According to *Price v. Williams*, *Cole v. Chief of Police* and *St. Pierre v. United States*, what characteristic must a controversy possess in order to be justiciable?

2. Ought it to be a condition of the justiciability of a controversy that it possess this characteristic and, if so, for what reasons?

MATTER OF STATE INDUSTRIAL COMMISSION

Court of Appeals of New York, 1918. 224 N.Y. 13, 119 N.E. 1027.

CARDOZO, J. On July 2, 1917, one of the members of the state industrial commission proposed to that body a resolution that every mutual compensation insurance company and every self-insurer should pay into the state fund, under section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, the present value of death benefits under every award against such insurance carriers for deaths occurring between July 1, 1914, and July 1, 1917, inclusive.

The resolution was neither adopted nor rejected. All that the commission did was to recite that there was doubt about its power, and to certify to the Appellate Division a question of law to be answered by that court. The following is the ques-

² Cf. *Willis v. Buchman*, 240 Ala. 386, 199 So. 892, 132 A.L.R. 1179 (1940); *Payne v. Jones*, 193 Okl. 609, 146 P.2d 113 (1944); *Dickey Oil Co. v. Wakefield*, 153 Kan. 489, 111 P. 2d 1113 (1941); and see Note, *Moot Questions of Public Interest*, 132 A.L.R. 1185 (1941).

tion certified: "Has the state industrial commission power and authority under the provisions of section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, to require the payment into the state fund, in accordance with the provisions of said section, of the present value of unpaid death benefits in cases in which awards were made prior to July 1, 1917?"

At the Appellate Division the Self-Insurer's Association, an unincorporated body of insurers, was allowed to appear and file a brief. Like permission was granted to the New York Central Railroad Company. Till then the attorney-general stood before the court alone. Even afterwards there were no adverse parties. There were merely friends of the court striving to enlighten its judgment. The Appellate Division did not order anything to be done or forborne. It could not. It merely answered a question. Its order was that the question propounded be answered in the affirmative. It thereupon granted leave to the intervenors to appeal to this court. The same question that was certified to the Appellate Division has been certified to us.

The determination of such an appeal is not within our jurisdiction. The practice is said to be justified under section 23 of the act. That section authorizes an appeal to the Appellate Division from an award or decision of the commission. It then provides that "the commission may also, in its discretion, certify to such Appellate Division of the Supreme Court, questions of law involved in its decision." Appeals may be taken to this court subject to the same limitations as in civil actions (*Matter of Harnett v. Steen Co.*, 216 N. Y. 101, 110 N. E. 170).

Nothing in these provisions sustains the practice followed. The commission made no decision. There was no case or controversy before it. No summons to attend a hearing had been given to the insurance carriers. No carrier had appeared. The members of the commission, debating their powers among themselves, asked and obtained the advisory opinion of a court. Without notice to the carriers to be affected by their action, they fortified themselves in advance by judicial instruction. In such circumstances the answer of the Appellate Division bound no one and settled nothing. We do not know that the commission will ever adopt the proposed resolution. If it does, and so notifies the carriers, the legality of its action will remain open for contest in the courts. No advice that may now be given in response to a request for light and guidance can prejudge the issue or control the outcome.

In that situation our duty is not doubtful. The function of the courts is to determine controversies between litigants (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 14 S. Ct. 1125, 38 L. Ed. 1047; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 819, 6 L. Ed. 204; *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Marye v. Parsons*, 114 U. S. 325, 330, 5 S. Ct. 932, 29 L. Ed. 205; *American Book Co. v. Kansas*, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 613). They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function (Thayer, *Cases on Constitutional Law*, vol. 1, p. 175; *American Doctrine of Const. Law*, 7 *Harvard Law Review*, 153). It is true that in England the custom of the constitution makes the judges of the high court the assistants of the Lords, and requires them, upon the demand of the Lords, to give "consultative" opinions (Thayer, *supra*; *Opinion of the Justices*, 126 Mass. 557, 562). But that custom is a survival of the days when the judges were members of the great council of the realm (Thayer, *supra*; T. E. May, *Parliamentary Practice* (12th ed.), pp. 55, 56, 182; Anson, *Law and Custom of the Constitution*, pp. 45, 52, 449). In the United States no such duty attaches to the judicial office in the absence of express provision of the Constitution (*Dinan v. Swig*, 223 Mass. 516, 519, 112 N. E. 91; *Opinion of Court*, 62 N. H. 704, 706; *Rice v. Austin*, 19 Minn. 103). Even in those states, *e.g.*, Massachusetts, Maine and New Hampshire, where such provisions are found, the opinions thus given have not the quality of judicial authority. The judges then act, "not as a court, but as the constitutional advisers of the other departments" (*Opinion of Justices*, 126 Mass. 557, 566; *Laughlin v. City of Portland*, 111 Me. 486, 497, 90 A. 318). In this state the legislature is without power to charge the courts with the performance of non-judicial duties (*Matter of Davies*, 168 N. Y. 89, 61 N. E. 118). It has not attempted to do so by this statute. The questions to be certified under section 23 of the act must be incidental to a pending controversy with adverse parties litigant. Those limitations apply to the Appellate Division. Even more explicit are the restrictions on this court. Our jurisdiction is to be exercised subject to the same limitations as in civil actions (*Workmen's Comp. Act*, § 23; *Code Civ. Pro.* § 190). The order under review is not one which finally determines a special proceeding (*Matter of Droege*, 197 N. Y. 44, 50, 90 N. E. 340; *Matter of Jones*, 181 N. Y. 389, 74 N. E. 226). It is not an intermediate order in a special proceeding. There has been no judicial proceeding at all. There has been a tender of advice which may be accepted or rejected.

The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards made before June, 1916; others to awards where one of the dependents is a widow. It is thus conceivable that the proposed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises.

The appeal must be dismissed without costs to either party.

HISCOCK, CH. J., COLLIN, CUDDEBACK, POUND, CRANE and ANDREWS, JJ., concur.

Appeal dismissed.

NOTE

State v. Dolley, 82 Kan. 533, 108 P. 846 (1910): The state on relation of the attorney general began proceedings in mandamus against the bank commissioner and the state treasurer, alleging that they had denied national banks the privilege of participating in the benefits of a state statute providing for the creation of a depositors' guaranty fund, and asking an order requiring them to accord national banks that privilege. The bank commissioner answered that on the strength of an opinion of the comptroller of the currency to the effect that national banks could not take part in such guaranty fund he had refused to permit them to do so, and he asserted that the part of the act relating to national banks was void. A large number of national and state banks were made defendants, and some of them asked that the action be abated on the ground that no real controversy existed between the plaintiff, represented by the attorney general, and the bank commissioner and state treasurer. Discussing their plea in abatement, the court said: "Of course the court can not undertake to interpret a statute because doubts exist as to its meaning, in advance of a situation having arisen requiring action thereunder. In order for judicial power to be exercised with regard to the statute there must be an actual and concrete controversy regarding it—a definite act demanded under it on the one hand and refused on the other. But if these conditions exist the fact that the demand or the refusal, or both, may have been prompted by a purpose to make what is called a 'test case' does not defeat jurisdiction. It is not uncommon or objectionable for an officer to refuse to act upon a doubtful construction of a statute, irrespective of his own judgment as to its true meaning, in order that the question may be speedily and finally settled in the courts. An action brought for that purpose under such circumstances is not fictitious, though it may in a sense be 'friendly.' (9 Encyc. Pl. Pr. 720.)

"If a resolution of the directors of a national bank asking

that it become a guaranteed bank under the state law has been tendered to the commissioner for his action, and he has refused to receive it, a justiciable controversy has arisen, notwithstanding he may believe that the attorney-general's interpretation of the law is correct, and may desire that the court so declare. The statute is valid or it is invalid. It imposes an official duty or it does not. The personal belief or wish of the officer can not affect the matter one way or the other. If there is reasonable ground for a difference of opinion as to whether he should act, his refusal to do so until the question is judicially determined can not be regarded as collusive or capricious. The fact that here the plaintiff has joined as defendants all persons supposed to have an interest in defeating its contention precludes any suggestion of a purpose to mislead the court into making a ruling without both sides of the question having been fairly presented."

PROBLEMS

1. According to *Matter of State Industrial Commission and State v. Dolley*, what characteristic must a controversy possess in order to be justiciable?
2. Ought it to be a condition of the justiciability of a controversy that it possess this characteristic and, if so, for what reasons?

SOUTHERN RAILWAY CO. v. STATE

Supreme Court of Georgia, 1902. 116 Ga. 276, 42 S.E. 508.

SIMMONS, C. J. The State of Georgia brought suit against the Southern Railway Company. The petition alleged that the plaintiff was the owner of a railroad, known as the Western and Atlantic Railroad, extending from Atlanta, Georgia, to Chattanooga, Tennessee; that this railroad had been operated directly by the plaintiff until 1870, when it was leased to a named corporation for twenty years; that upon the expiration of this lease, December 27, 1890, the railroad was leased, for the twenty-nine years next ensuing, to the Nashville, Chattanooga and St. Louis Railway, which became under the law a corporation of the State of Georgia under the name and style of the Western and Atlantic Railroad Company, the lease being made pursuant to an act of the General Assembly approved November 12, 1889, to which reference was prayed; that at the time of this last lease a certain railway company was using and occupying a portion of the right of way of the Western and Atlantic yards in the city of Dalton to a point on the right of way about seven miles south from the yards; that this use and occupation was maintained by this company until July, 1894, when all of its assets were sold by judicial decree and purchased by the defendant, since which time the defendant had used and occupied the described portion of the right of way. The petition then set out certain claims which the defendant, as successor

of other companies, was alleged to assert to this part of the right of way, and reasons why the plaintiff considered these claims as without merit and the acts of the defendants as a continuing trespass. Waiving discovery, the petition prayed that the court should determine what rights in the property were acquired by the various predecessors of the defendant, and whether the rights of a named company were acquired by succession by the defendant and the intermediate companies; "that the rights and equities of the parties in and to the subject-matter be ascertained, determined, and declared, and be established and enforced by proper orders and decrees of the court;" that it be decreed that the defendant has no right to the use of the disputed premises, and that the operation of its trains thereon constitutes a continuing trespass; that there be an accounting to ascertain the value of the use by the defendant of the premises, and a money decree rendered for the amount so ascertained; for general relief, and for process. To this petition the defendant filed general and special demurrers, one of the latter based on the ground that the petition showed that whatever compensation was due for the use and occupation of the premises was due, not to the plaintiff, but to its lessee. The demurrers were overruled by the judge, and the defendant excepted.

1. In the first place we are clear that the judge should have sustained the demurrer to that part of the petition which claimed compensation for the use and occupation of the premises. The act of 1889 (Acts of 1889, p. 362), to which the petition prayed reference, as well as the petition itself, showed that the State had leased its railroad and all of its appurtenances. If the State had title to the premises described in the petition, then the right to the possession of those premises passed, under the lease, to the lessee. It necessarily follows that an unauthorized use of the premises by the defendant, without injury to the freehold, could have injured only the lessee, which alone was entitled to the possession and use. The plaintiff during the continuance of the lease, has no right to the possession or use of the leased property, and, therefore, can not recover from a third party compensation for the use and occupation. The right of action would be in the lessee, and by it alone could such a suit be maintained. Nor is the petition aided by the prayers for general relief. There are no allegations on which could be based any sort of remedy against the defendant in favor of the plaintiff. There is no intimation of any injury to the freehold, and therefore, as the occupation of the defendant is alleged to have been entirely during the period of the lease, the lessor has

no right of action. The petition fails utterly to allege any physical injury to the freehold, and we think the case readily distinguishable from those in which it has been held that a lessor may maintain a suit, as for an injury to the reversion, where there is a continuing trespass, under a claim of right, which might by time ripen into an adverse title. See *Arneson v. Spawn*, 2 S. D. 269, 39 Am. St. Rep. 783. Prescription does not in any case run against the State. *Glaze v. Railroad Co.*, 67 Ga. 761; *Kirschner v. Railroad Co.*, *Ibid.* 760. The defendant's occupancy can, therefore, never ripen into a right adverse to the plaintiff and can not be regarded as an injury to the freehold or reversion. For these reasons we think that the plaintiff's petition does not show that the plaintiff is entitled to any judgment or decree against the defendant. If any right of action is shown it is in the lessee and not in the plaintiff, and the latter can not maintain the action.

2. What has been said above disposes of the alleged rights of the plaintiff to any affirmative relief against the defendant. The petition also makes a case similar to what was known to the Scotch law as a declaratory action, wherein the plaintiff craved a determination and declaration of his rights but did not ask that the defendant be decreed to do or pay anything. No such action is known to our law in matters of this kind. Bills for direction in certain equity cases stand upon a very different footing. Our courts have no jurisdiction to pass upon questions of titles to land at the instance of one of two claimants in a proceeding in which no other judgment or decree is prayed. The object of an action is to redress or prevent a wrong, and it is essential that the plaintiff should seek something more than a mere declaration of his rights. In a suit respecting titles to land, the court does not pass upon all questions suggested, but decides only such questions as are necessary to determine the right of the plaintiff to the relief prayed against the defendant. Where no relief is prayed, the court can not undertake to decide such legal questions, however important or interesting, as may be suggested by a plaintiff who is in doubt as to his rights. The present petition was insufficient as a basis for relief against the defendant, or for a determination of the rights of the parties and their privies in the premises in dispute. The trial judge should, therefore, have sustained the demurrers.

Judgment reversed. All the Justices concurring except LEWIS, J., absent.¹

¹ Georgia enacted a Declaratory Judgment Law on February 12, 1945, which is published in 7 Ga. B. J. 266. See Hitch, *The Declaratory Judgment—A Necessary Addition to Georgia Procedure*, 7 Ga. B. J. 132 (1944).

NOTES

(1) *City of Alexandria v. Wilks*, 18 So. 2d 341 (La. App. 1944): A Louisiana statute authorizes municipalities to condemn and cause to be demolished buildings within their corporate limits which are in a dilapidated or dangerous condition and which, because of their condition, endanger the public safety; and it prescribes the procedure which municipalities are to follow in that regard. Pursuant to this statute the council of the City of Alexandria adopted a resolution condemning a building owned by defendant. The mayor notified defendant of the adoption of this resolution and called upon him to remove his building or to show cause why he should not do so at the next regular meeting of the council. However, defendant ignored the mayor's notice, and the council then resolved that the city proceed to have the building demolished and that the city attorney take the necessary legal proceedings to that end. Subsequently, the city brought this suit in which it alleged that defendant refused to recognize its right to demolish his building and threatened to enjoin any attempt it might make to do so, and prayed that it be adjudged that its action in condemning the building was final and that it was authorized to demolish it. The city appeals from a judgment dismissing the suit on the ground that its petition did not state a cause of action. *Affirmed*. (i) "It is conceded by all that the courts of this state are without judicial power or authority to render declaratory judgments or advisory opinions." (ii) "We are of the opinion that plaintiff has not the legal right to anticipate the action, if any, to which defendant will resort if demolition of the building is begun by it, nor force tender of issues involving its alleged right to demolish the building in the manner attempted herein. . . . It is now the obvious right of the city, if it would further prosecute the matter, to undertake execution of its own positive resolutions, and force the issue it apprehends and has sought to bring about in the present case." (iii) We approve the following reasons given by the lower court for its judgment: "The plaintiff does not ask for a judgment permitted under our law. . . . [A] 1—though there is an allegation that there is a controversy and dispute between the plaintiff and the defendant, nevertheless, it is nothing more than an allegation that the defendant had refused to recognize the validity of the proceedings of the city council, and would in the future oppose the demolition of his building. The Court would not be authorized to now pass upon a situation that is anticipated and is entirely potential."

(2) Markby, *Elements of Law*, §§ 852–853 (6th ed. 1905)*: "It is a general rule that courts of law will not move unless some duty or obligation is broken. Very often parties assert rights which they do not as yet wish to exercise, or repudiate obligations which they are not at the moment called upon to perform. And so disputes arise without any wrong having actually taken place; and very often parties are desirous, from reasons of convenience, to come into court and get their rights declared at once without waiting for the expected breach. No doubt there may be strong reasons of convenience in favour of such a course.

*By permission of Oxford University Press, the publisher.

The intention to do an act would in a vast majority of cases, be abandoned, if it was known to be illegal; or, what comes to the same thing, if it was known that a court of law would treat it as illegal. The consideration which counterbalances these reasons of convenience is the fear that too much opportunity might be given to persons of litigious character to bring useless and vexatious suits against their neighbors, and thus the number of suits would be greatly multiplied. And since the burden and expense of litigation always fall to some extent on the public at large, this burden and expense cannot be increased solely with reference to considerations of private convenience. The rule, therefore, is generally adhered to, that there must be some actual wrong done before the court will set itself in motion. . . .

"The respective schemes of procedure are fashioned according to these views. In all courts the party who seeks to set the court in motion has, except in very special cases . . . , to make a statement which, whether it be called a complaint, an indictment, a charge, a demand, a bill of complaint, a plaint, or a declaration, is in fact an assertion that a wrong has been committed; including also generally, in the civil courts, a claim for redress."

(3) Borchard, *Declaratory Judgments*, 4-5 (2d ed. 1941)*: "[E]nglish law and practice, down to relatively modern times, regarded the commission of *wrong*, public or private, as practically an essential condition to invoking the judicial arm of the State. It seems to have been overlooked that the social equilibrium is disturbed when rights of property or status are made insecure by attack or challenge, and that the judicial process should afford protection not only from physical injuries and violence, but also against the denial of established rights and against unfounded claims which challenge cherished values, *i.e.*, against uncertainty, peril, and insecurity. And although English equity had developed numerous remedies to quiet and remove clouds from title, jurists, in emphasizing the curative function of the judicial process, failed to perceive its equally important preventive function. Thus Blackstone, apparently unchallenged, was able to announce the half-truth: 'The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society.'

"The view that wrongs condition the right of action and judicial protection is too superficial and, by the too colloquial juxtaposition of 'rights' and 'wrongs,' has given a misleading scope to the conception of 'wrongs,' 'threatened wrongs,' and judicial power. Some of the more critical students of procedure have realized the error in assuming the presence of 'delict' or 'wrong' in every cause of action. In actions for partition, to declare a marriage void, to quiet title or remove a cloud, to perpetuate testimony, and in innumerable others, there is, as a rule, no delict at all.² The occasion of the state's intervention

* By permission of Banks Baldwin Law Publishing Co., the publisher.

² Cf. Report of the Committee on the Judiciary of the Senate, Sen. Rep. on Public Bills, 73d Congress, 2d Sess., Vol. II, No. 1005, 4-5: "The fact is that the declaratory judgment in a limited form has been known to the common law, or under statute, for many years. The equitable actions for the removal of clouds from title, the action by a person in possession for the statutory period against a

is not an actual physical infringement of the plaintiff's rights—the conception usually associated with delict or wrong—but the denial or dispute of his right, placing him in danger or jeopardy and causing him detriment or prejudice, under such circumstances that the plaintiff may properly invoke the court's protection to reestablish, safe-guard, and declare his right, and thus restore the social order."

PROBLEMS

1. According to *Southern Railway Co. v. State and Alexandria v. Wilks*, what characteristic must a controversy possess in order to be justiciable?

2. Ought it to be a condition of the justiciability of a controversy that it possess this characteristic and, if so, for what reasons?

SECTION 2. THE DECLARATORY JUDGMENT

COMMITTEE ON THE JUDICIARY OF THE SENATE

Senate Reports on Public Bills, 73d Congress, 2d Session,
Vol. II, No. 1005, pp. 2, 3, 6.

The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. It enables parties in disputes over their rights over a contract, deed, lease, will, or any other written instrument to sue for a declaration of rights, without breach of the contract, etc., citing as defendants those who oppose their claims of right. It has been employed in State courts mainly for the construction of instruments of all kinds, for the determination of status in marital or domestic relations, for the determination of contested rights of property, real or personal, and for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction. . . .

The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon

person claiming under a record title to have the latter's title declared void, actions impressing a trust on the legal title, actions to declare written instruments null, actions to construe wills, statutes authorizing judgments proving the tenor of lost instruments or proving the validity, when contested, of instruments to be recorded, and other illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names. The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution."

one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co. v. City of Elgin* (284 Ill. 389, 120 N.E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor v. Buckner* (156 Tenn. 278, 300 S.W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy. So now it is often necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justiciable controversy. In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights. . . . There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties.

. . .

. . . The 1,200 American decisions [under state Declaratory Judgment Acts] have established that the proceeding must be adversary, all interested parties must be cited, the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy. It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed.

PROBLEMS

1. What are the purposes of the declaratory judgment statutes?
2. What change or changes do they make in the conditions of justiciability?

DAVIS v. STATE

Court of Appeals of Maryland, 1944. 183 Md. 385, 37 A.2d 880.

Suit by William A. Davis against the State of Maryland and others, constituting the State Board of Medical Examiners, for a declaratory judgment that the 1943 statute for the regulation of advertising by physicians and surgeons is unconstitutional. From an adverse decree, complainant appeals.

Affirmed.

DELAPLAINE, JUDGE. Dr. William A. Davis, of Baltimore, brought this suit under the Uniform Declaratory Judgments Act to obtain a judicial declaration that the statute passed by the Legislature of Maryland in 1943 for the regulation of advertising by physicians and surgeons is unconstitutional. Acts of 1943, ch. 600, Code 1943 Supp., art. 43, secs. 144A, 144B, 144C.

The statute provides that no physician or surgeon in this State shall advertise except as follows: (a) He may use a personal professional card, not larger than 3-1/2 by 2 inches, upon which may be printed his name, title, address, specialty, telephone number, and office hours; (b) he may mail to any of his bona fide patients a removal notice, not larger than 5 by 7 inches, containing his name, title, specialty, telephone number, office hours, and his old and new addresses; and (c) he may exhibit on the door or wall of the building in which he practices not more than two signs, on which shall be placed his name and title or degree, the letters of which shall not exceed 3 inches square, and he may also exhibit such sign on the door of his office. Any physician or surgeon who advertises or solicits in any other manner, whether by mail, card, newspaper, pamphlet, radio or otherwise, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than \$50 and not more than \$300 for each offense. The statute expressly provides that a violation of the statute shall constitute unprofessional conduct, and the license of any physician or surgeon guilty of such violation shall be subject to revocation.

Complainant alleges that, after graduating in both pharmacy and medicine from the University of Maryland, he was licensed to practice medicine in this State in 1898; that he was teacher at the Baltimore Medical College from 1898 to 1905; that he took a post graduate course in medicine at the Johns Hopkins University and also did clinical work in England, France and Germany; that he has been practicing in an honorable manner, and the treatments used by him, particularly for venereal

diseases, are those approved by the American medical profession; that he has been advertising in a Baltimore newspaper and in the telephone directory, but since he stopped advertising after the passage of the Act of 1943 his receipts fell more than 50% below those of previous years; that the statute is unconstitutional because (1) it is not a valid exercise of the police power of the State, but deprives him of his property without due process of law in contravention of article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States, and (2) it is arbitrary and discriminatory and deprives him of the equal protection of the laws guaranteed by the Fourteenth Amendment.

It was questioned by the State Board of Medical Examiners whether complainant could use a declaratory judgment proceeding to test the constitutionality of the statute. The early conception of the courts was that they were a branch of the government created to redress private wrongs and to punish for the commission of crimes. The Uniform Declaratory Judgments Act¹ was adopted by the State of Maryland in 1939. Acts of 1939, ch. 294, Code 1939, art. 31A. The primary purpose of this Act is to relieve litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a right has been violated, and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. *De Charette v. St. Matthews Bank & Trust Co.*, 214 Ky. 400, 283 S. W. 410, 50 A. L. R. 34. Section 1 of the Uniform Act explicitly declares that the existence of another adequate remedy shall not preclude a judgment for declaratory relief "in cases where it is appropriate." However, we have decided that the Act is designed to supplement, not to supersede, existing remedies at law and in equity, and accordingly where an immediate cause of action exists for which one of the existing remedies is available and adequate, a proceeding for a declaratory judgment is not appropriate within the contemplation of the Act.² *Caroline Street Permanent*

¹ The Act can be found in Borchard, *Declaratory Judgments*, 1039-1041 (2d ed. 1941).

² There is a difference of opinion and decision as to whether or not an action for a declaratory judgment may be maintained if the plaintiff is in a position to seek and obtain "coercive relief." *Compare, e. g., Pierce v. Farmers State Bank*, 222 Ind. 116, 51 N.E.2d 480 (1943) ("[W]here a cause of action for affirmative executory relief has matured, the courts will . . . determine the rights of the parties only in connection with an action seeking the relief to which the complaining party would be entitled if his contentions are to be sustained") *with New Haven Water Co. v. City of New Haven*, 131 Conn. 456, 40 A.2d 763 (1944) ("Under our law a party who properly resorts to an action for a declaratory judgment is not required to bring an independent action to enforce the right thereupon declared.") *See Gray v. Defa*, 103 Utah 339, 135 P.2d 251 (1943); Borchard, *op. cit. supra*, at 295-296, 315 ff.; Anderson, *Declaratory Judgments*,

Building Ass'n v. Sohn, 178 Md. 434, 444, 13 A. 2d 616. For instance, we held that the Legislature did not intend that a declaratory judgment proceeding should take the place of the ordinary action for damages for breach of contract. *Porcelain Enamel & Mfg. Co. v. Jeffrey Mfg. Co.*, 177 Md. 677, 11 A. 2d 451. Likewise, we held that the Circuit Court cannot decide by declaratory judgment whether a will should be probated, for the Orphans' Court is vested with jurisdiction to admit wills to probate. *Morgan v. Dietrich*, 179 Md. 199, 16 A. 2d 916.

However, if a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional. It is true that a court of equity has power to restrain the enforcement of a void statute or ordinance at the suit of a person injuriously affected. *City of Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65; *Spann v. Gaither*, 152 Md. 1, 136 A. 41, 50 A. L. R. 620; *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417. But in this case complainant is affected by the Act of 1943 and he is entitled to apply for a declaratory judgment under the Uniform Act, rather than run the risk of being subjected to criminal prosecution, and possibly having his license revoked. The distinctive characteristic of a declaratory judgment is that the declaration stands by itself, and does not involve executory process or coercive relief. Of course, a court is not empowered to decide moot questions or abstract propositions, either under the Uniform Act or any other procedure, however convenient it might be to have the questions decided for the government of future cases, but will determine only actual controversies.³ Where, by act of the parties or subsequent law, the controversy has come to an end, the case becomes moot and should be treated accordingly. *United States v. Alaska Steamship Co.*, 253 U. S. 113, 40 S. Ct. 448, 64 L. Ed. 808; *Ladner v. Siegel*, 294 Pa. 368, 144 A. 274; *Reese v. Adamson*, 297 Pa. 13, 146 A. 262; *Revis v. Daugherty, Attorney General*, 215 Ky. 823, 287 S. W. 28. But it is obvious that complainant is not attempting to secure an abstract decision or one advising what the law would be on an uncertain or hypothetical state of facts. He is directly affected by the challenged statute. While the usual course of judicial procedure ordinarily results in a judgment requiring an award

§§ 47-50 (1940); Note, *May Declaratory and Coercive or Executory Relief Be Combined in Action Under Declaratory Judgment Act*, 155 A.L.R. 501 (1945).

³ Cf. *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 65 S. Ct. 1384, 89 L. Ed. 1275 (1940): "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." Cf. also *United Public Workers of America v. Mitchell*, 330 U. S. 75, 67 S. Ct. 565, 91 L. Ed. 509 (1947); *Eccles v. Peoples Bank*, 332 U. S. 426, 68 S. Ct. 641, — L. Ed. — (1948).

of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. In *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 348, 77 L. Ed. 730, 736, 87 A. L. R. 1191, brought under the Declaratory Judgments Act of Tennessee to secure a declaration that a tax levied on the storage of gasoline was invalid as applied to appellant, Justice Stone declared: "But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. . . . It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. . . . As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial."

In *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 178 Md. 38, 12 A. 2d 201, complainant used the procedure of the Declaratory Judgment Act to ask the Court to declare the 1939 amendment to the Fair Trade Act constitutional. The Court of Appeals, after making an exhaustive study of the constitutional question, held the amendment unconstitutional. Likewise, in *Oursler v. Tawes*, 178 Md. 471, 13 A. 2d 763, where certain citizens of Maryland attacked the constitutionality of the State Income Tax Law of 1939, we thoroughly discussed the validity of the statute, although no issue was raised as to the propriety of the procedure under the Declaratory Judgments Act. In other States declaratory judgment proceedings have been employed on many occasions to determine questions as to the validity or construction of statutes or ordinances. [Citations omitted.] The Federal Declaratory Judgments Act of 1934, 28 U. S. C. A. § 400, has frequently been invoked as a means of testing the constitutionality of acts of Congress, even though the Act does not specifically authorize judgments as to the construction or validity of statutes. *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000. Section 2 of the Maryland Declaratory Judgments Act expressly provides that any person whose rights,

status or other legal relations are affected by a statute may have determined any question of construction or validity arising under the statute and obtain a declaration of rights, status or other legal relations thereunder. Section 12 declares that the purpose of the Act is to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. Section 15 commands that the Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it and to harmonize as far as possible with Federal laws and regulations on the subject of declaratory judgments and decrees. We adopt the rule laid down in *Acme Finance Co. v. Huse, Director of Licenses*, 192 Wash. 96, 73 P. 2d 341, 114 A. L. R. 1345, Id., 194 Wash. 706, 77 P. 2d 595, 114 A. L. R. 1360, that a person may obtain a judgment under the Uniform Declaratory Judgments Act declaring whether or not a statute is constitutional, and that a proper case for rendition of such a declaratory judgment is presented when the plaintiff alleges that he will be directly damaged in person or in property if the statute is enforced, and such enforcement will result in the infringement of his constitutional rights, and the defendant is charged with the duty of enforcing the statute and is enforcing it or is about to enforce it.

Complainant instituted this suit against the State of Maryland and the members of the State Board of Medical Examiners. We presume that he included the State, rather than the State's Attorney or the Attorney General, as a party defendant because he decided to stop advertising rather than run the risk of having his license revoked, and consequently he was unable to allege that he had been threatened with arrest. The Court below properly sustained a demurrer filed by the Attorney General on behalf of the State Board. One of the highest attributes of sovereignty is the immunity of the State from suit at law and in equity by its own citizens or the citizens of any other State, unless it waives this immunity. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890, 35 L. R. A., N. S., 243; *Dunne v. State*, 162 Md. 274, 159 A. 751, certiorari denied, 287 U. S. 564, 53 S. Ct. 23, 77 L. Ed. 497. Although a State may not be sued without its consent, an officer of the State acting under color of his official authority may be enjoined from enforcing a State law claimed to be repugnant to the State or Federal Constitution, even though such injunction may cause the State law to remain inoperative until the constitutional question is judicially determined. *Weyler v. Gibson*, 110 Md. 636, 73 A. 261, 17 Ann. Cas. 731; *Public Ser-*

vice Co. of Northern Illinois v. Corboy, 250 U. S. 153, 39 S. Ct. 440, 63 L. Ed. 905; 49 Am. Jur., States, Territories, and Dependencies sec. 95. Professor Borchard claims that this rationalization is strained and unnecessary for the reason that it is the enactment of the Legislature, and not the personal view of the Attorney General, that creates the prejudice and jeopardy and motivates the right of action. Nevertheless, it has been held that the immunity of the State from suit is not modified by the Uniform Declaratory Judgments Act. Purity Oats Co. v. Kansas, 125 Kan. 558, 264 P. 740; Borchard, Declaratory Judgments, 2d Edition, 374. Since complainant stated in the Court below that he did not wish leave to amend, the Court was right in dismissing the amended bill of complaint.⁴ . . .

Decree affirmed with costs.⁵

TOWN OF TRYON v. DUKE POWER CO.

Supreme Court of North Carolina, 1942. 222 N.C. 200, 22 S.E.2d 450.

The town of Tryon brought this proceeding under the Declaratory Judgment Act, chapter 102, Public Laws of 1931, to have declared and determined certain rights which it claimed the right to exercise against the defendant under a contract alleged to have been made between the town and defendant's predecessor in title to certain utilities.

[The Town's complaint alleged that in 1913 it enacted an ordinance whereby it granted to Tryon Electric Service Co. (hereinafter called "Tryon Co.") a franchise to supply electric current to residents of the Town; that acting under this franchise Tryon Co. did supply electric current to the Town's residents by means of a plant which it maintained; that defendant succeeded to the franchise and acquired the plant of Tryon Co. and thereby became subject to the provisions of the contract between the Town and Tryon Co.; and that section 6 of the franchise provided that if the Town should at any time decide to own and operate an electrical lighting plant it might acquire the plant of the then holder of the franchise and that if the Town and the franchise-holder could not

⁴ In the remainder of the opinion the court held that the statute was a constitutional exercise of the State's police power.

⁵ See *Asbury Hospital v. Cass County*, 72 N.D. 359, 7 N.W.2d 438 (1943). The author wrote the Attorney General of Maryland with respect to the Davis case as follows: "I do not understand why it is that the Court, having decided that the action was not maintainable against the State or the State Board, nevertheless decided the substantive problem involved in the case." The Attorney General was good enough to reply: "The State did not contend that the Board of Medical Examiners was not a proper party to the case. . . . Furthermore . . . it is my recollection that both the appellant and the appellee urged the court to decide [the constitutionality of the statute] without regard to technicalities . . ."

agree upon terms the Town might acquire the plant by condemnation pursuant to Chapter 86, Public Laws of 1911. The Town asked the court to adjudge whether or not, in the event that it should decide to own and operate its own lighting plant, it might acquire defendant's plant by purchase or condemnation, as provided in the franchise.

[By its answer defendant admitted that it had succeeded to the rights and obligations of Tryon Co. under the franchise but it denied plaintiff's right to the declaratory judgment which it sought, and upon motion for judgment on the pleadings the court held that because the Town had not declared its purpose "to pursue any rights which it might have to acquire defendant's property" pursuant to the franchise, it was not entitled to a declaratory judgment. But the court permitted the Town to amend its complaint by alleging further that it had requested defendant to fix a price for its plant but that defendant had declined to do so on the ground that plaintiff had no right under the franchise or otherwise to acquire it; that there was, therefore, an actual controversy between plaintiff and defendant respecting their rights under the franchise; that as long as that controversy existed plaintiff would be "seriously handicapped in making financial arrangements to exercise the rights" it claimed under the franchise; and that it desired to have the controversy resolved so that it might exercise its rights under the franchise.]

The defendant answered the amendments to the complaint, admitting that the town of Tryon had asked it to name a price on its properties, and it had declined to do so, and that it had denied the right of the town to condemn its property because of the repeal of chapter 86, Public Laws of 1911;¹ defendant further admitted that there was a difference of opinion between plaintiff and defendant respecting plaintiff's right to condemn defendant's property, which right it denied; and averred that the effect of such difference of opinion upon plaintiff's financial arrangements "when and if undertaken" was conjectural and uncertain.

Defendant renewed the objection that upon the facts alleged, the plaintiff was not entitled to a declaratory judgment and moved to dismiss the action.

Judge Pless then entered a judgment finding certain facts and holding that the amendments above quoted "did not constitute a declaration of intent on the part of the plaintiff to

¹ This Act authorized municipalities, *inter alia*, to construct, maintain and operate electric lighting plants, but provided that if such a plant had been privately constructed in any municipality, the latter, before undertaking to build a public plant, should first acquire the existing plant by purchase or condemnation.

exercise any rights which it might have under section 6 of the defendant's franchise" (counsel for plaintiff having stated that the plaintiff had not authorized him to allege such intent), and dismissed the action.

Plaintiff appealed, assigning error.

SEAWELL, J. Section 1 of the Declaratory Judgment Act, chapter 102, Public Laws of 1931, empowers courts of record within their respective jurisdictions "to declare rights, status, and other legal relations," and section 2 has special relation to such "rights, status or other legal relations arising out of a municipal ordinance, contract or franchise," with special relation to the construction or validity thereof; but the apparent broad terms of the statute do not confer upon the court an unlimited jurisdiction of a merely advisory nature to construe and declare the law. Before a declaratory judgment may be obtained, the existence of those conditions upon which the jurisdiction of the court may be invoked must appear. Under the statute the court will not entertain an *ex parte* proceeding or a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. . . .

. . . [T]he courts have construed the law in such manner that the jurisdiction may be protected against mere academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any right or the avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise. *Allison v. Sharp*, 209 N. C. 477, 481, 184 S. E. 27; *Light Co. v. Iseley*, 203 N. C. 811, 167 S. E. 56; *Poore v. Poore*, 201 N. C. 791, 161 S. E. 532. . . .

The fundamental principle sought to be preserved is thus stated by Chief Justice Hughes in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 287, 324, 80 L. Ed. 688: "The judicial power does not extend to a determination of abstract questions."

Thus the principle which protects the jurisdiction of the Court from the suggested invasion and keeps its decisions within the traditional judicial functions is the presence of a genuine controversy as a jurisdictional necessity.

The Federal Declaratory Judgments Act, 48 Stat. at L., 955, ch. 512, U. S. C. A., Title 28, sec. 400, expressly requires that the proceeding be based on an actual controversy, and that is true of similar statutes in several of the states. While our statute does not expressly so provide, section 4 of the Act

enlarges the specific categories mentioned elsewhere in the statute by making it applicable to "any proceedings . . . in which a judgment or decree will terminate the controversy or remove an uncertainty"; and section 5 empowers the court to refuse to render a declaratory judgment which would not have this effect. However, it is unnecessary to stress the legal inferences which might be drawn from this phraseology, since the point has been directly decided in this State. Quoting from *Light Co. v. Iseley*, *supra*, p. 820: "It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. See *Walker v. Phelps*, 202 N. C. 344, 162 S. E. 727."

Indeed, it is uniformly held both in this country and in England that in the absence of any express provision making the existence of an actual controversy necessary to the jurisdiction, this limitation is nevertheless implied and will be observed by the courts. *Cryan's Estate*, 301 Pa. 386, 152 Atl. 675, 71 A. L. R. 1417; *Heller v. Shapiro*, 208 Wis. 310, 342 N. W. 174, 87 A. L. R. 1201; *Denver v. Lynch*, 92 Col. 102, 18 Pac. 2d 907, 86 A. L. R. 907; see Annotations, 87 A. L. R. 1211, 68 A. L. R. 17, and 50 A. L. R. 45.

In marginal cases the rule may be difficult to apply, because it involves a definition, or at least an appraisal, of the term "controversy,"³ which must, perhaps, depend upon the individual case; but in the case at bar, the Court does not feel that such embarrassment exists. A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utilities of the defendant—without any practical bearing on any contemplated action—does not constitute a controversy within the meaning of the cited cases. *Jefferson County Ex Rel. Coleman v. Chilton*, 236 Ky. 614, 33 S. W. 2d 601.

The proceeding was properly dismissed, and the judgment of the court below is

Affirmed.⁴

³ Cf. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 509 (1947), in which the court, two of the Justices not participating, divided five to two on the question whether the controversy was "hypothetical."

⁴ See *State Mutual Life Assurance Co. v. Webster*, 148 F.2d 315 (C.C.A. 9th 1945); *Anderson v. Wyoming Development Co.*, 60 Wyo. 417, 154 P.2d 318.

AMERICAN MACHINE & METALS, INC. v. DE BOTHEZAT
IMPELLER CO., INC.

Circuit Court of Appeals of the United States, Second Circuit, 1948.
166 F.2d 535.

SWAN, CIRCUIT JUDGE. This appeal presents a question under the Declaratory Judgments Act, 28 U. S. C. A. § 400, which authorizes the courts of the United States "in cases of actual controversy" to declare "rights and other legal relations of any interested party petitioning for such declaration," without regard to whether further relief is or could be sought. Before answering the complaint, the defendant moved, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723, for dismissal of the action on the ground that (a) the complaint fails to state a claim upon which relief can be granted, and (b) the court lacks jurisdiction because there is no matter in controversy between the parties. This motion was granted for the reason, as we read the district court's opinion, that the facts alleged in the complaint did not show the existence of an "actual controversy." From the judgment of dismissal the plaintiff has appealed.

In summary the allegations of the complaint are the following:

In 1934 the parties entered into a contract under which the defendant conveyed to the plaintiff certain patents and certain physical equipment for the making of fans and other products and the plaintiff agreed to pay the defendant license fees (not less than \$5,000 annually) based on the "net sales" of its products. So long as the contract continued the fees were to be paid on "net sales" regardless of whether the plaintiff's products were covered by the patents or whether the patents had expired. The contract contained no expiration date but could be terminated at any time by the plaintiff on six months' notice. In the event of such termination the plaintiff was to transfer the patents back to the defendant and to cease using the name "De Bothezat," which it agreed to use in its literature and sales promotion while the contract continued. Since February 19, 1946 the plaintiff has neither manufactured nor sold any product for which possession of the patents is essential. The plaintiff "desires and intends" to exercise its right of termination under the contract and "desires and

(1944); *Dewey & Almy Chemical Co. v. American Anode, Inc.*, 137 F.2d 68 (C.C. A. 3d 1943); *Portsmouth Restaurant Ass'n v. Hotel and Restaurant Employees Alliance*, 183 Va. 757, 33 S.E.2d 218 (1945); *Columbia Pictures Corporation v. De Toth*, 26 Cal. 2d 753, 161 P.2d 217 (1945). Cf. *Cover v. Schwartz*, 133 F.2d 541 (C.C.A. 2d 1942).

intends" to continue in the business of selling fans and ventilating equipment. The defendant at various times has made claims and assertions to the plaintiff and other persons to the effect that upon termination of the contract the plaintiff will no longer have the right to continue the manufacture of fans and ventilating equipment, and "has led plaintiff to believe" that upon termination of the contract defendant will sue plaintiff if it does not cease the manufacture and sale of fans and ventilating equipment. Said claims and assertions by defendant "are without basis and an actual controversy exists between the parties," and plaintiff seeks a declaration of the rights of the parties in order to avoid the possible accrual of avoidable damages. The prayer requests a declaration "particularly with respect to the proper interpretation and effect of the agreement" and that the court declare the right of plaintiff to continue to manufacture and sell fans and other noninfringing products after termination of the agreement and without the payment of further sums to defendant.

In concluding that no controversy exists the district judge noted that the plaintiff has not yet given notice of termination of the contract and may never do so; the opinion states [75 F. Supp. 421, 424]:

"In this case, if the court should decide that plaintiff might terminate and continue its manufacture and sale of products other than those covered by patents, plaintiff might and probably would terminate. If the court should decide otherwise, plaintiff would probably continue under the agreement until its termination and no controversy such as now claimed to exist might ever be present. In other words, plaintiff has not elected what it wishes to do and its action might and could render academic the very declaration which it seeks.

"The complaint is, therefore, dismissed because no justiciable controversy exists which would justify the maintenance of an action under the Declaratory Judgment Statute. The relief prayed for should not be granted at this time either as a matter of discretion or otherwise."

We think the Judge construed the statute too narrowly. As the Supreme Court said in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826, the difference between an abstract question and a "controversy" is one of degree. If notice of termination had been given, the defendant apparently concedes that there might be an actual controversy, although even after termination it would still be optional with the plaintiff whether to continue the business and an adverse decision would probably induce him not to continue. Before ter-

mination, the controversy is one step further removed from actuality but not so far removed as to present only an abstract question, in our opinion. Once the notice of termination is given, it is beyond recall; the dispute between the parties concerns the right of the plaintiff to continue business if that contingency happens. Where there is an actual controversy over contingent rights, a declaratory judgment may nevertheless be granted. *Pennsylvania Casualty Co. v. Upchurch*, 5 Cir., 139 F. 2d 892, 894; *Franklin Life Ins. Co. v. Johnson*, 10 Cir., 157 F. 2d 653, 658; *Sigal v. Wise*, 114 Conn. 297, 158 A. 891, 892, 893; *Borchard, Declaratory Judgments*, pp. 422-3. In *Sigal v. Wise*, *supra*, the tenant of premises destroyed by fire sought a declaration of his right to use the premises if the landlord should rebuild. Although the right claimed was contingent, the court thought that "its present determination may well serve a very real practical need of the parties for guidance in their future conduct." There, it is true, the contingency was within the control of the defendant, not of the plaintiff as here, but that does not seem to be a material distinction. After bringing the contingency to pass it will be too late to avoid an action for damages if the plaintiff acts as he intends by continuing the business. The very purpose of the declaratory judgment procedure is to prevent the accrual of such avoidable damages. This procedure has long been recognized in the law of Scotland and we may well be guided by Lord Justice Dunedin's opinion in *Russian C. & I. Bank v. British Bank*, [1921] 2 A. C. 438, 448. There the British bank had obtained a loan from the Russian bank and pledged securities to protect the lender. In order to decide whether to exercise its privilege of redeeming the pledged securities, the British bank wanted to know whether the loan was repayable in rubles or sterling—a question on which the parties were in dispute. Lord Dunedin was of opinion that the case was an appropriate one for a declaratory judgment even though it was probable that if sterling was declared to be the required currency the British bank would not exercise its privilege of redemption. This seems indistinguishable from the case at bar. Also pertinent are *Altwater v. Freeman*, 319 U. S. 359, 63 S. Ct. 1115, 87 L. Ed. 1450, and *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 63 S. Ct. 172, 87 L. Ed. 165. In the latter case the Supreme Court permitted a patent licensee to seek a declaratory judgment as to the validity of certain patents without previously relinquishing its rights under the license.

Johnson v. Interstate Transit Lines, 10 Cir., 163 F. 2d 125, and *Perlberg v. Northwestern Mut. Life Ins. Co.*, E. D. Pa., 62 F. Supp. 76, relied upon by the appellee, did not involve such an irrevocable choice as the termination of the contract presents to the

plaintiff in the case at bar. Failure to declare his seniority rights did not seriously affect the employee in the Johnson case, since he was not threatened with immediate loss of employment or status; and the insured in the Perlberg case, seeking a declaration as to the consequences of a default, would have been able even in the event of a default to reinstate his policy without penalty, or failing that to receive paid-up insurance or the cash surrender value. By the decision below the appellant here must "act on his own view of his rights" and risk an otherwise profitable business in order to present a justiciable "controversy." The Declaratory Judgments Act was designed to obviate just this sort of peril, and we believe its benefits should be available to one in the appellant's situation. S. Rep. No. 1005, 73d Cong., 2 Sess., pp. 2-3; Borchard, *Declaratory Judgments*, pp. 58, 930.

Judgment reversed and cause remanded for trial on the merits.

Part III

THE LEGAL AND FACTUAL CONDITIONS OF A REMEDY

BOOK I. THE PRIMACY OF THE SUBSTANTIVE LAW

Chapter IV

CAUSE OF ACTION AS A SUBSTANTIVE CONCEPTION

SECTION 1. CAUSE OF ACTION AS A PRIMA FACIE RIGHT TO A REMEDY

EMORY v. HAZARD POWDER COMPANY

Supreme Court of South Carolina, 1885. 22 S.C. 476.

MR. CHIEF JUSTICE SIMPSON. The plaintiff, respondent, instituted the proceeding below, alleging, as a cause of action, that defendant, appellant, had erected upon its premises a powder magazine, within two hundred yards of the dwelling of respondent, and within twenty-five feet of the road leading to a ship yard, in which magazine the appellant intended to keep in store large quantities of gunpowder; that said magazine was erected, notwithstanding the respondent had given written notice that she objected to its location so near her dwelling. And in the 6th paragraph of the complaint, she alleged that the erection and maintaining of a powder magazine, on the premises aforesaid, greatly endangered the lives of herself, her family, and servants from explosion, and also the lives and property of the public travelling on said road; and she demanded judgment: 1st. That said nuisance be removed. 2nd. That she recover of the defendant, five thousand dollars (\$5,000) damages caused thereby, and the costs of action. The defendant, answering, denied the allegation of paragraph VI.; and for further defence alleged that said powder magazine was erected with the knowledge and consent of all the adjacent proprietors, save the plaintiff, whose dwelling is much further removed from its site, than that of one who consented to its erection.

The cause came on for trial before his honor, Judge Kershaw, at the February term for Charleston County, when the counsel for the defence moved that the plaintiff be required to

elect whether she would sue for damages, or for an injunction against a continuance of the alleged nuisance, which motion, after argument, was refused. The trial then proceeded, ending with a verdict for the plaintiff in the sum of \$500. The defendant appealed upon the following nine exceptions: . . .

We will consider these exceptions in their order. The first is as to the form of the action. The prayer of the complaint demands two kinds of relief—one equitable, and the other legal; and it is contended that the plaintiff should have been required to elect between them; *i.e.*, whether she should proceed for the removal of the nuisance, or for the recovery of damages. In other words, in the opinion of the defendant, there was a misjoinder, and on that account the action could not proceed until the plaintiff had elected. No doubt there can be a misjoinder of causes of action,¹ and when this occurs it is objectionable, and may be met, either by demurrer, by motion to make more definite, and perhaps by motion to require the plaintiff to elect; but can there be a misjoinder of remedies demanded, liable to be assailed as on misjoinder of causes of action?

Causes of action are very often confounded with remedies; and being regarded as synonymous, the rules established with reference to the one, are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought, are entirely different matters. The one precedes and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true, that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action, and in this sense the relief sought is the cause of the action; but this is not the legal sense of the phrase "cause of action." On the contrary, that sense is as stated above; *i.e.*, a breach of one's legal rights.

When thus understood, and when the two are kept separate and apart as they should be, it will be seen at once, that while in some cases there may be a misjoinder, by the incorporation

¹ See Clark, Code Pleading, 434-456 (2d ed. 1947). The problem of the permissible joinder of causes of action is considered in the advanced course in civil procedure.

of two distinct causes in the same complaint, which would be subject to censure and correction, yet it does not follow, therefore, that the insertion of two or more demands for relief in the same complaint would constitute a like misjoinder, and subject to like censure and correction. On the contrary, inasmuch as often times there springs from one cause of action several remedial rights, entitling the party injured to several kinds of relief, it is not only not improper to unite several demands in such cases for relief, but failing to do so, the plaintiff might fail to secure the full measure of his rights.² Hence we find numerous cases in the books, where two or more demands are made in the same complaint, and especially is this so in cases where the party is entitled to both legal and equitable relief, as in the case now before the court. See *Pomeroy on Remedies*, § 460, in which is given, as an example of this principle, the very form of action adopted below, to-wit, an action to remove a nuisance by injunction, and for damages. We think the ruling of the Circuit judge was correct, both upon principle and authority. . . .

It is the judgment of this court that the judgment of the Circuit Court be affirmed.³

MANKO v. CITY OF BUFFALO

Court of Appeals of New York, 1945. 294 N.Y. 109, 60 N.E.2d 828.

Action by Stephen Manko against the City of Buffalo and others to recover damages resulting from refusal of preference to which plaintiff was entitled as an honorably discharged disabled veteran. From a judgment entered on an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, 268 App. Div. 955, 51 N.Y.S. 2d 864, which reversed on the law an order of the Special Term of the Supreme Court, Hinkley, J., entered in Erie County denying a motion of defendant to dismiss the second cause of action set forth in the complaint on ground that the same did not state facts sufficient to constitute a cause of action and which granted the motion, plaintiff appeals.

² See Clark, *op. cit. supra*, at 472-489.

³ Cf. *Baker v. Baker*, 220 Iowa 1216, 1220, 264 N.W. 116, 103 A. L. R. 995 (1935): "A cause of action consists of the existence of a right in the plaintiff and a violation of that right by the defendant. It must not be confused with remedies prayed for. It is to be found in the facts stated in the petition, not in the prayer for relief. The prayer may be an aid in interpreting the petition and in determining whether or not more than one cause of action is pleaded. But a prayer for relief never alone states a cause of action. A cause of action may be single although the plaintiff seeks a variety of remedies. He may seek to right a single wrong by numerous separate operations. . . . The mere fact, therefore, that plaintiff prays for multiple relief does not indicate that he has stated more than one cause of action."

Judgment of Appellate Division reversed, and order of Special Term affirmed.

THACHER, JUDGE. Section 21 of the Civil Service Law, Consol. Laws, c. 7, affords to honorably discharged soldiers, sailors, marines and nurses of the army, navy or marine corps of the United States, disabled in the actual performance of duty in any war, a preference in appointment to positions in the public service. A refusal to allow this preference is denounced by the section as a misdemeanor, and an honorably discharged disabled veteran who has been denied the preference is given "a right of action therefor in any court of competent jurisdiction for damages, and also a remedy by mandamus for righting the wrong."

In a proceeding under article 78 of the Civil Practice Act, the plaintiff, a disabled veteran, asserted that he was entitled to and had been deprived of a preference in appointment to the position of supervisor of automobiles in the Police Department of the City of Buffalo. In that proceeding he obtained an order directing his appointment to the position. *Manko v. City of Buffalo*, 293 N. Y. 669, 56 N. E. 2d 261. He has since been appointed to the position and has brought this action for "damages" as provided by the statute.

It seems quite clear from the wording of the statute that there is but a single cause of action for damages resulting from the refusal of the preference. Plaintiff, however, having been put to very substantial expense for legal services necessarily incurred in the enforcement of his remedy under article 78 and in contempt proceedings to enforce the order therein, the reasonable value and agreed price of which is alleged to be the sum of \$15,000, has seen fit in his complaint in this action to divide his single cause of action in two. In a first cause of action he seeks to recover his loss of salary of \$300 a month during the period for which he was kept out of the position from April 23, 1942, to June 25, 1944, less earnings received during this period of \$306.82, and then, in "a second, separate, other and further cause of action", plaintiff realleges all the allegations previously alleged except those with relation to the loss of his earnings, and in lieu thereof alleges the circumstances under which and the legal services for which he became obligated to the extent of \$15,000.

A motion made by the defendants to dismiss the so-called second cause of action, upon the ground that it failed to set forth facts sufficient to constitute a cause of action, was denied by Special Term but its order was reversed by the Ap-

pellate Division, which granted the motion and directed judgment dismissing the "second cause of action". From that judgment the plaintiff has appealed to this court. The motion to dismiss was properly denied at Special Term because the complaint in all its parts alleged but a single cause of action for damages predicated upon the statute and the motion was addressed, not to the sufficiency of facts constituting that cause of action, but merely to the right to recover as part of the damage expenses incurred for attorneys' fees. One statement of the cause of action could not be dismissed without dismissing both. By dividing the damage one cannot divide a single cause of action.¹

For this reason only, and without consideration of the damages which may be recovered under the statute, the judgment of the Appellate Division should be reversed and the order of the Special Term affirmed, with costs in this court and in the Appellate Division.

LEHMAN, C. J., and LOUGHRAN, LEWIS, CONWAY, DESMOND, and DYE, JJ., concur.

Judgment accordingly.²

NEW YORK CIVIL PRACTICE ACT

§ 254. First Pleading to be Complaint. The first pleading, on the part of the plaintiff, is the complaint.

§ 255. Contents of Complaint. The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought . . . ; and the names of all the parties to the action, plaintiff and defendant.

2. A statement of each cause of action.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

§ 479. Demand as affecting amount of judgment. Where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint. Where there

¹ Cf. *Luotto v. Field*, 294 N.Y. 460, 63 N.E.2d 58 (1945): "Inappropriate and insufficient allegations of damage in a complaint may be stricken out on order, but on such an order there cannot be entered a judgment which has the effect of severing those allegations into a separate cause of action, when such allegations really constitute only a part of the statement of damage in a single cause of action for a single wrong. Neither section 476 of the Civil Practice Act [*supra* p. 86, n. 1], nor rule 114 as to ordering judgment as to a part of a cause of action or summary judgment as to one of several causes of action, permits the entry of a separate judgment as to such separate items of damage only."

² Cf. *Eklund v. Evans*, 211 Minn. 164, 300 N.W. 617 (1941).

is an answer, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issues.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

BALLE v. MOSELEY

Supreme Court of South Carolina, 1885. 13 S.C. 439.

McIVER, A. J. This action was brought to recover damages for a trespass alleged to have been committed by defendant in causing a bale of cotton to be taken from the possession of the plaintiff. The complaint, which is set out in the brief, alleges that the plaintiff was the owner and entitled to the immediate possession of the bale of cotton; that defendant caused the same to be seized and taken from the possession of the Laurens Railroad Company, with whom it had been deposited by the plaintiff, and concludes in these words: "That the defendant, having obtained the possession of the said bale of cotton, did cause the said sheriff to sell the same as under a lien warrant, and thereby said defendant unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff one hundred dollars." The defendant "answered the complaint as to the merits," but whether by a general denial or by alleging matters justifying the seizure, does not appear, nor is it important.

At the trial the defendant interposed the objection, by way of demurrer, that the complaint did not state facts sufficient to constitute a cause of action, the only omission claimed being that the complaint contained no demand for relief. Even conceding that the complaint is defective in not concluding with a *formal* demand for relief, the practical question in this case is

whether such defect rendered it amenable to the objection that the complaint does not state facts sufficient to constitute a cause of action. The demand for relief is not part of the cause of action, (*Pom. on Rem.*, § 580, p. 630,) and, therefore, any defect in the form of such demand does not constitute any ground for the demurrer interposed in this case. 2 *Wait's Pr.* 452-3. It does not appear that any *fact* is omitted which is necessary to constitute the plaintiff's cause of action, and until this does appear there is no ground upon which a demurrer under sub-division 6 of Section 167 of the code, could be sustained. If the complaint is defective in that it does not comply with the requisites prescribed by sub-divisions 1 and 3 of Section 165 of the code, such defects afford no grounds for the demurrer interposed here; for that is the appropriate remedy only where the defect complained of is the omission to state facts sufficient to constitute a cause of action.

In pursuance of these views the judgment of this court has already been entered affirming the judgment of the Circuit Court.

NOTES

(1) *Menke v. Rovin*, 352 Mo. 826, 180 S. W. 2d 24 (1944): Action by the buyers of a building to recover damages from the seller for fraud in the sale. "The petition concluded with this paragraph: 'Wherefore, plaintiff states they have sustained actual damages by reason of said false representations in the sum of \$7,500.00, and they should be awarded punitive damages. . . . in the sum of \$15,000.00, and for which total sum of \$22,500.00 these plaintiffs pray judgment against the defendant.' Nowhere else in the petition was there an express allegation of the injury suffered because of the fraud. Such an allegation is one of the requisites in stating the cause of action. Rovin contends the above statement . . . cannot be considered as a part of the statement of the cause of action because it is found in the prayer of the petition and 'the prayer is no part of the petition.' This court has on several occasions loosely stated the prayer is no part of the petition. This is incorrect. Section 916, R. S. 1939, Mo. R. S. A., requires that a petition shall contain a demand of the relief to which the plaintiff may suppose himself entitled. The principle intended to be described by such loose reference found in the cases is more accurately expressed by saying the relief prayed for is no part of plaintiff's cause of action. This is so because the court must render the proper judgment on the facts alleged and is not restricted to the form of relief demanded. This is a departure from the common law where the form of the prayer for relief was considered important. Even though in the instant case the statement of the damage or injury is found in the concluding paragraph of the petition which customarily contains the prayer, it is an allegation of injury. We hold it may properly be considered as an element in the statement of the cause of action."

(2) *Klauser v. Reeves*, 226 Wis. 305, 312, 276 N. W. 356 (1937): Plaintiff alleged that the former husband of defendant was indebted to plaintiff on certain promissory notes which he gave plaintiff in 1930, and that in 1936 he transferred certain property to defendant and that defendant took title thereto subject to his debts, including his indebtedness to plaintiff. The trial court overruled defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. *Affirmed*. (i) The complaint stated a cause of action. While the transfer of the property to defendant subject to her former husband's debts did not render her personally liable for them, it did have the effect of creating a charge or lien upon the property in favor of his creditors. (ii) "In view of this, it must be held that the allegations of the complaint are sufficient to state a cause of action in equity to charge the property received by defendant . . . with the lien of plaintiff's debt. While it is true that no equitable relief is demanded and that the sole prayer for relief is for a judgment at law upon notes, and while plaintiff is not entitled to this judgment, that does not warrant the sustaining of a demurrer to the complaint. The question upon general demurrer is whether any cause of action is stated. If it is, the fact that plaintiff is not entitled to the relief demanded in the prayer is wholly immaterial."

(3) *Parker v. Pullman & Co.*, 36 App. Div. 208, 217-218, 53 N. Y. S. 839 (2d Dep't 1899): "As to the second question, the right of the defendant to test jurisdiction by demurrer depends partly upon sections 481 (now Civ. Prac. Act, § 255) and 1207 (now Civ. Prac. Act, § 479) of the Code of Civil Procedure. The former provides that a complaint must contain, *first*, the title of the action, the name of the court and the names of the parties; *second*, a statement of the facts constituting the cause of action; and, *third*, 'a demand of the judgment to which the plaintiff supposes himself entitled.' But this does not mean that the plaintiff may not have any other judgment than he demands, although section 1207 provides that where there is no answer the judgment shall not be more favorable to the plaintiff than he has demanded in his complaint. This clearly relates, not to an action where a demurrer has been interposed, but to one where a judgment is to be entered by default; and the reason is plain, a party may be willing to permit a judgment by default, not more favorable than that which is demanded in the complaint; but when he demurs, as in the present instance, his claim is that the plaintiff is entitled to no relief whatever on the allegations of the complaint, for the demurrer here is that the 'complaint does not state facts sufficient to constitute a cause of action,' in other words, that the plaintiff is entitled to no judgment whatever.

"Under our present system of pleading a plaintiff is entitled to such relief as the allegations of the complaint justify, irrespective of the prayer for judgment. (*Emery v. Pease*, 20 N. Y. 62; *Wright v. Wright*, 54 id. 437; *Williams v. Slote*, 70 id. 601; *Wetmore v. Porter*, 92 id. 76.) In the last case the court said (p. 80): 'It has been repeatedly held, under the Code, that if the facts stated in a complaint show that the plaintiff is

entitled to any relief, either legal or equitable, it is not demurrable upon the ground that the party has not demanded the precise relief to which he appears to be entitled.'"¹

MITCHELL v. SWANWOOD COAL COMPANY

Supreme Court of Iowa, 1918. 182 Iowa 1002, 166 N.W. 391.

GAYNOR, J. I. This action is brought to recover for the death of one Stanley Damsky, an employee of the defendant's. It is claimed that his injuries were sustained while in the course of his employment. The deceased was a coal miner. Defendant was engaged in operating a coal mine. Deceased was employed in mining coal at the time he received the injuries which caused his death. The injuries were caused by a fall of slate or rock or other material from the roof of the mine. The defendant had rejected the Workmen's Compensation Act, and was not operating under it.

Plaintiff, in his petition, stated these facts, substantially as set out above. Defendant filed a motion for a more specific statement, and asked the court to require the plaintiff to state: (1) Whether she relied upon negligence or carelessness of the defendant, either of omission or commission, as a basis for recovery; (2) if she did so rely, what breach of duty the defendant was guilty of that contributed to or caused the injury; (3) what acts the defendant was guilty of which she claimed constituted negligence, and were the proximate cause of the accident resulting in death. This motion was overruled, and this is the first error complained of. In the brief points submitted by appellant, it is stated thus:

"The court erred in not requiring plaintiff to plead the negligence on which she relied."

The thought of the defendant is that, inasmuch as it cannot be held liable except for negligence, the party who relies upon negligence as a basis for recovery must plead the facts which constituted the negligence, to make a triable issue. Negligence consists in the omission to do something which it was the duty of the defendant to do, or the commission of some act which it was the duty of the defendant not to commit, the commission or doing of which was the proximate cause of the injury. The mere pleading that he was in the employment of the defendant, who was operating a coal mine, and that he was

¹ *Accord*: Mackey v. Auer, 8 Hun 180 (N. Y. Sup. Ct. 1876); Schenectady Co. v. Schenectady R. Co., 106 App. Div. 336, 163 N.Y.S. 775 (3d Dep't 1905); Vella v. United States Fidelity & Guaranty Co., 245 App. Div. 339, 13 N.Y.S.2d 962 (4th Dep't 1935). Cf. Hasbrouck v. New Paltz, etc., Traction Co., 98 App. Div. 563, 90 N.Y.S. 977 (3d Dep't 1904).

injured, and that the injury arose out of and in the course of the employment, and that the master has elected to reject the provisions of the act, does not, it is claimed, advise the defendant of the basic fact upon which liability is predicated, to wit, that it did or omitted to do something which it was bound not to omit or bound not to do . . . ; that the master owes many duties to the servant, and when the servant is injured by a failure of the master to discharge a duty, the servant, in a suit to recover for the injuries, must state the specific act which he claims constituted the negligence, so that the master may be advised of his claim, and be prepared to meet it or concede it.

This reasoning is good, and has support in authority, as a general proposition, and, if it were not for the provisions of the Workmen's Compensation Act, would be operative here. This act provides:

"In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment, where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence." Section 2477-m, Subdiv. c (4), Code Supplement 1913.

We have no doubt that the legislature, in framing this provision, had in mind the then condition of the law touching the subject-matter covered by the statute, and recognized that, under that law, the master owed certain masterial duties to his servant, a failure to discharge which, resulting in injury, created liability on the part of the master. . . . It recognized that these matters were susceptible of proof; that, under the law as it existed before this enactment, the burden rested upon the injured servant to prove the negligence of the master in respect to these matters and the injury. The legislature, no doubt, in its wisdom saw that, ordinarily, no injury arises to the servant when the master has discharged all these legal duties to the servant, and therefore said that an injury occurring to the servant while in the course of his employment, is at least presumptive evidence that the master has failed to discharge some of these duties, and that, after the passage of the act, in all suits growing out of injuries arising in this way, the burden should be upon the master to exculpate himself, and show that the injury did not result from any failure on its part to discharge its duties to the servant.

In the discussion, we confine ourselves to the phase of the case here presented: the failure of the master to furnish the servant a reasonably safe place in which to work. . . . The falling of the slate and the injury makes a prima-facie case that the master had not discharged this duty. The burden then came to the master to show that it was, in fact, reasonably safe, in order to escape liability. A showing that it was not reasonably safe, met by a counter showing that the servant, too, was negligent, and that the servant's negligence contributed to the injury, does not meet the requirements of the law, and exonerate the defendant. Whatever effect such showing may have upon the amount of recovery, it is no defense. To escape liability, the defendant must show that it was not negligent in respect to this matter, or that its negligence did not cause the injury, or that the injury was due to some willful misconduct on the part of the servant, or was the result of the intoxicated condition of the servant. The servant, in the course of his employment, assumes no risks incident to the business where the risk can be traceable to the master's negligence.

Of course, to bring it within the provisions of the statute, it must appear that the injury sustained arose out of and in the course of the employment. When the servant has established the employment, and that the injury arose out of and in the course of his employment, a prima-facie case of negligence is made against the master; and this prima-facie case rests on the thought or the assumption that, if the master had discharged his duties, the condition would not exist which produced the injury to the servant while in the course of his employment.

In pleading a cause of action, the pleader is not bound to state more than he is required to prove in order to establish his right to recover. He is not bound to negative any fact which his opponent is bound to allege and prove as defensive matter. It is said, however, that plaintiff's cause of action is bottomed on negligence; that he should at least have been required to say in his pleading that he claimed the defendant was negligent, even though not required to set out the specific acts of negligence; and that, negligence having been alleged, the proof of the substantive fact of negligence is to be found laid in the statute. But, under the statute, he is not bound to prove specific acts of negligence as a basis for recovery. He is not bound to prove, by substantive evidence, negligence at all, as a basis of recovery. When he shows the employment, and that he was injured in the course of his employment, the law steps in, and says to the master:

"This injury is presumed to be the result of your negligence. The burden rests on you to show that this is not true, and unless you so do, you shall be holden to answer for the injury."

To say in the petition that the plaintiff based his right of action upon the negligence of the defendant, would advise the defendant of nothing more than he is advised of by the mere statement of employment and injury in the course of employment; for the law steps in at that point, and says, *prima facie*, "This injury is due to your negligence;" and casts the burden upon the defendant to exonerate itself.¹ We think there was no error in the court's ruling upon this point. See *Mitchell v. Phillips Mining Co.*, 181 Iowa 600. . . .

On the whole record, we think the cause ought to be, and is,—*Affirmed*.

NOTES

(1) *Knight v. Emmons Brothers Company*, 181 App. Div. 751, 168 N. Y. S. 803 (1st Dep't 1918): Action to recover damages for breach of a contract whereby defendant appointed plaintiff its sole selling agent for defendant's entire production of hats. Demurrer to complaint sustained "because it was assumed that defendant's refusal might have been based upon its determination to discontinue altogether the manufacture of hats." *Reversed*. "If the defendant had answered and had set up as a reason for its action the discontinuance of manufacture there would have been presented a sufficient excuse." But "no such fact is suggested by the complaint or demurrer. . . . It was no part of plaintiff's duty to assign a reason for defendant's breach. That was a matter for defendant to plead."

(2) *Jaffe v. Stone*, 18 Cal. 2d 146, 158-159, 114 P. 2d 335 (1941): "It has been suggested that . . . the complaint has two serious defects of pleading. First, it is said that since the commencement of new criminal proceedings before the filing of the malicious prosecution suit would be a defense to the action, the complaint should allege that no such proceedings have been commenced. The answer to this contention is obvious. If such subsequent proceedings have, in fact, been commenced, defendants may so plead in their answers. But, like other defenses, this should be raised in the answer, not anticipated in the complaint. It would not involve a positive averment of fact, an element of plaintiff's cause of action; plaintiff would simply be negating an exception to, or a qualification upon, these elements of his cause of action; he would have to single out that particular exception among others that might be raised as defenses. But

¹ Cf. *Lyons v. Liberty National Bank*, 65 F. 2d 837, 838 (App. D. C. 1933): "For it is not necessary that the plaintiff should anticipate and negative matters of defense or matters which should come more properly from the other side, which, as Hale said, 'is leaping before one comes to the stile,' and it is sufficient that each pleading should in itself contain a good *prima facie* case without reference to possible objections not yet urged."

the salutary role of pleading frowns upon averments negating or anticipating defenses, and requires that such matters be left to the answer. Accordingly we are satisfied that such an allegation cannot be deemed an essential element of the cause of action."

SECTION 2. THE ELEMENTS OF A CAUSE OF ACTION

POMEROY, CODE REMEDIES

5th ed. 1929. §§ 413 (* 519)-414 (*520).*

Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. . . . The "cause of action," therefore, must always consist of two factors, (1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property, or contract; and (2) the delict, or wrongful act or omission of the defendant, by which the primary right and duty have been violated. Every action when analyzed will be found to contain these two separate and distinct elements, and in combination they constitute the "cause of action." The primary right and duty by themselves are not the cause of action, because when existing by themselves, unbroken by the defendant's wrong, they do not give rise to any action. . . . Much less can the delict or wrong by itself be the cause of action, because without the primary right and duty of the parties to act upon, it does not create any right of action or remedial right as I have used the phrase. It is very clear from this analysis that the "cause of action" mentioned in the codes includes and consists of these two branches or elements in combination,—the primary right and duty of the respective parties, and the wrongful act or omission by which they are violated or broken.

The first of these branches must always from the nature of the case, be a conclusion of law. The law by its commands creates a rule applicable to certain facts and circumstances, by the operation of which, when these facts and circumstances exist, a right arises, and is held by the plaintiff, and a corresponding duty arises and devolves upon the defendant. While this first factor of the "cause of action" is therefore always a conclusion or proposition of law, and results from the command of the supreme power in the State as its *cause*, it necessarily presupposes the existence of certain facts and events as the *occasion* of its coming into operation. A complete and

* By permission of Little, Brown & Company, the publisher.

exhaustive exhibition of it would thus require a statement of the legal rule itself applicable to the given condition of facts and circumstances, and of the primary right and duty arising therefrom; and also an allegation that the facts and circumstances themselves to which the rule applies, and on the occasion of which the right and duty arise, do actually exist or have existed. If this principle were adopted in pleading, every cause of action would demand a mingled averment of legal rules, of the facts and events to which they apply, and of the rights and duties resulting from the operation of the given rule upon the existing facts. In the second branch of the cause of action, there is, on the other hand, no element whatever of the law: it is simply and wholly a matter of fact. It consists entirely of affirmative acts wrongfully done, or of negative omissions wrongfully suffered by the defendant; and its statement in a pleading can be nothing more than a narrative of such acts or omissions. . . .

KEISTER'S ADM'R v. KEISTER'S EX'RS

Supreme Court of Appeals of Virginia, 1918.
123 Va. 157, 96 S.E. 315, 1 A.L.R. 439.

STATEMENT OF THE CASE AND FACTS

This case is before us upon review of the action of the court below in sustaining a demurrer to the declaration of the plaintiff in error against the defendants in error and dismissing the declaration in an action for damages for the death of the plaintiff's intestate alleged to have been caused by the wrongful act of the testator of the defendant in error.

THE FACTS

The material facts appearing from the allegations of the declaration are, that a wife (the plaintiff in error's intestate) was killed by her husband (the defendant in error's testator); that the husband and wife were lawfully married and were living together in that relationship when the wife was so killed; that the husband survived his wife and then died leaving a will by the appointment of which the defendants in error duly qualified as his executors.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The following positions with respect to the law are well settled and are not questioned by counsel in the case:

Notwithstanding the existence of the statutes, sections 2902, 2903 and 2906 of the Code of Virginia,¹ the plaintiff in error in the instant case had no right to maintain the action and the demurrer was, therefore, properly sustained by the trial court, unless the wife, had she survived, would have had a right of action against the husband, had he survived, for damages for an assault upon her by him during the coverture. At common law no such right of action existed on the part of the wife.² If such a right of action existed at the time the action in the instant case was instituted, it was conferred by section 2286-a of Pollard's Code of Virginia, 1904 (Acts 1899-1900, p. 1240). That part of such statute relied on as conferring the right of action in question, is as follows:

" . . . A married woman may contract and be contracted with, sue . . . in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by . . . her, shall have accrued before or after the passage of this act. . . ."

The sole controverted question in the case, upon which its decision turns, is—

1. Has the statute last quoted changed the common law on the subject and conferred upon a married woman a right

¹ The corresponding sections of Va. Code Ann. (1942) are §§ 5786, 5787 and 5790. They are parts of the Wrongful Death Statute of that State. Section 5786 provides that whenever the death of a person shall be caused by the wrongful act of any person and the act is such as would, if death had not occurred, have entitled the party injured to maintain an action and to recover damages in respect thereof, then the person who would have been liable, if death had not occurred, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to a felony. It also provides that any such right of action shall survive the death of the wrongdoer and may be enforced against his executor or administrator. Section 5787 provides that every such action shall be brought by and in the name of the personal representative of such deceased person.

² Cf. *Butler v. Wolf Sussman, Inc.*, *supra* p. 19, and see *Steele v. Steele*, 65 F. Supp. 329, 330 (D.C.D.C. 1946): "While the criminal liability of a husband for assaulting his wife was recognized, nevertheless, her incapacity to maintain an action for damages against her husband still continued. It was customary to assign two different reasons for this anomalous distinction. First, it was said that since at common law the husband and wife were regarded as one person, neither could maintain an action against the other for a tort inflicted by the latter upon the person of the former. *Spector v. Weisman*, 59 App.D.C. 280, 40 F.2d 792. As is frequently the case in our legal system, the common law shrank from pursuing this line of reasoning with remorseless logic to its bitter end. Else, the theory that husband and wife are one person would have led to the corollary that no criminal liability attaches to the husband for assaulting his wife, because in so doing, he was attacking only himself. Obviously such an absurd postulate would have met with but scant consideration and would not have been tolerated. The second explanation at times advanced for the wife's legal incapacity to sue her husband in tort is one of policy. It is said that to permit such suits would interfere with domestic felicity and conjugal harmony. This argument savors more of a rationalization of a preconceived notion than of bona fide reasoning leading to logical conclusion. A wife is at liberty to apply to the police and prosecuting authorities as well as to the criminal courts for redress. Surely, this recourse is as apt to be disturbing to family tranquility as a resort to a civil action for damages."

of action against a husband for damages for an assault upon her committed by the husband during the coverture?

This is a question of first impression in this State and must, therefore, be resolved by a consideration of it upon principle and the construction of the statute last quoted, with such aid as we can obtain from the decisions of other jurisdictions construing statutes on the same subject.

In approaching this question we have to bear in mind the elementary principle that a right of action at law can in no case exist unless, (a) the plaintiff be found to have had, at the time the alleged cause of action arose, a substantive civil right, the breach or invasion of which right (constituting in the case of a tort a civil wrong) gave rise to a cause of action; and (b) the plaintiff be found to have had at the time the action is instituted a civil remedy by action at law.

In regard to the very ancient maxim that wherever there is a right there is a remedy, it is said in 1 Cooley on Torts (3d ed.), p. 22: "*No Wrong Without a Remedy*. Judicial development of the law is perceived in two forms: In the recognition of rights and in giving a remedy for the invasion or deprivation of rights. . . . A right cannot be recognized until the principle is found which supports it. But when a right is found, a remedy must follow of course."

The primary inquiry confronting us in the instant case, therefore, is whether the married woman's statute in Virginia, the portion of which relied on by the plaintiff in error is quoted above, confers upon married women during coverture the substantive civil right essential to support a cause of action in a suit at law for damages instituted during the coverture by a wife against her husband, for an assault upon her committed by the husband during the coverture.

The substantive civil right in question is a legal existence—a legal personality—of a married woman, separate and apart from the legal personality of her husband, during coverture. Such a right a married woman had not and has not at common law.

The inquiry before us, therefore, is not whether the statute relied on, as aforesaid, has given married women the same remedies they would have if unmarried (whether as if they had never married, or as if no longer married) to enforce or to obtain compensation for the invasion of substantive rights which may accrue to married women (whether at common law or by statute), but whether the statute aforesaid has conferred on married women the particular substantive right

aforesaid. This is apparent when we consider that the statute may do the former completely, and yet, if a married woman be not given the civil right aforesaid, out of the invasion of which only can arise the cause of action in question, the remedy given her by the statute can avail her nothing in an action such as that in question.

Hence, it must be constantly borne in mind in the consideration of the subject before us that the primary inquiry is, has the statute last quoted conferred upon married women the substantive right above mentioned—has it changed the rule of the common law on this subject?

Now with respect to the construction of statutes in derogation of the common law there are certain well settled rules which have been so long and so well established that we need but to refer to them. Among those rules is the following: The legislature is presumed to have known and to have had the common law in mind in the enactment of the statute; and the statute will be construed to read as if the common law remained unchanged (that is to say, the statute will be read along with the provisions of the common law, and the latter will be read into the statute), unless the purpose of the statute to change the common law appears from the express language of it or by necessary implication from such language. The existence of the rule last mentioned is not controverted in the instant case. We do not, therefore, occupy space in discussing it, or citing authority to sustain the statement of such rule.

Coming now construe the statute of Virginia aforesaid in the light of the common law on the subject, and by aid of the rule of statutory construction mentioned, we are met by the following considerations:

Such statute does not *expressly* confer the substantive right aforesaid. Does it do so by necessary implication? If so, it must, of course, be done by words of no uncertain meaning; by language which must not be entirely consistent with the common law on the subject remaining unaltered.

Whether the statute above quoted confers on married women the substantive right aforesaid manifestly depends, in the last analysis, upon ascertaining to what point of time, in the life of the married woman asserting the right of action in question, the statute means to refer in its reference to her status as "unmarried"; and also upon ascertaining the meaning with which the statute uses the word "unmarried." Does it mean to refer to the time of the arising of the alleged cause

of action (to the time of the assault of the husband upon the wife in a case such as the instant case), and to say that the status of a married woman shall be regarded, as of that time, as if it were the same as if she had *never been married*? or does the statute refer to the time the suit or action is instituted, and mean to say that, as of the latter time, she shall be regarded as not having a husband? Are we to construe the clause of the statute, "as if she were unmarried," to mean, "as if she did not have a husband," or "as if she had never been married"? It is only by the latter construction that any foundation can be found on which to rest the position that the statute by implication changes the common law and confers upon married women the substantive right aforesaid.

Now the word "unmarried" originally and ordinarily means, it is true, *never having been married*—"But the term is a word of flexible meaning and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question*." 8 Words & Phrases (1st ed.), p. 7196. (Italics supplied.) The subject of that part of the statute which is under consideration is the right of a married woman to sue (and also their liability to be sued, on the side of the statute not quoted above and with which we are not concerned in the instant case). If the legislature had intended to confer upon married women the substantive civil right of a legal existence and legal personality separate and apart from that of the husband, during coverture, nothing was easier than for it to have said so in language of no uncertain meaning. If it intended not to confer such a substantive right, but merely to enlarge the remedies of married women with respect to other substantive rights of theirs existing at common law and conferred by the first portion of this very statute, the language of the statute was appropriate to accomplish the latter purpose and its object is fully accomplished when the statute is given that meaning. It is not necessary, therefore, that any further meaning be given to it. This being so, we cannot, under the rule of construction above referred to, give any further meaning to it. Hence, it seems clear to us that the statute in its use of the word "unmarried" has reference to the time the suit or action in question is instituted, and uses the word "unmarried" with the meaning of "not having a husband" at the time of the suit or action. Such being the meaning with which the word "unmarried" is used in the statute, clearly the effect of the statute, as above indicated, is merely to provide that all disabilities of married women *to sue* (and be sued) are there-

by removed *as of the time a suit or action is instituted* by (or against) a married woman, upon any cause of action then existing by or against her. That is to say, the statute under consideration merely provides that at all times during the coverture a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary, as aforesaid, to give rise to such cause of action. The statute, therefore, is entirely consistent with the common law, which does not confer the substantive right aforesaid on married women, and hence does not change the common law in that regard by implication. That is to say, the portion of the statute under consideration has reference only to the remedies thereby given to married women and does not confer the substantive right necessary to support the right of a married woman to sue her husband for an assault upon her committed by him during the coverture.³

Such is the conclusion to which we are led by a consideration of the statute on principle and under what are universally considered and admitted to be proper rules of construction of such a statute. We are confirmed in that conclusion by our examination of the authorities on the subject.⁴ . . .

For the foregoing reasons, we hold that there was no error in the action of the court below in sustaining the demurrer to the declaration of the plaintiff, and the judgment complained of will be affirmed.⁵

*Affirmed.*⁶

³ Cf. *Steele v. Steele*, *supra* note 2, at 331: "As has been indicated the philosophy that forms the basis for the majority opinion of the Thompson case [*Thompson v. Thompson*, 218 U.S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, in which the court held that the Married Women's Act of the District of Columbia was not intended to permit a wife to sue her husband in tort, but merely to abrogate the pre-existing rule that a wife and husband had to join as plaintiffs in an action for tort committed against her by a third party], is that statutes derogatory of the common law must be strictly construed. This general principle has, however, largely lost its potency. Certainly, it is at least to be limited to cases of ambiguities in statutes and is hardly ever invoked if the legislative expression is clear and unambiguous. In such a situation this principle of statutory construction is generally no longer operative to frustrate or interfere with the fulfillment of the legislative will."

⁴ The court's discussion of *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S.W. 832, 187 S.W. 460, L.R.A. 1917 B, 774, relied on by the plaintiff in error, and of other authorities construing similar statutes of other jurisdictions, is omitted.

⁵ See Note, 104 A.L.R. 1271 (1936).

⁶ Concurring opinion of Burks, J., omitted. Cf. *Steele v. Steele*, *supra* note 2, at 332: "The principle of that decision [the decision in the Thompson case, *supra* note 3] does not govern the disposition of the instant case. Prior to the alleged assault a decree of absolute divorce had been entered terminating the bond between plaintiff and defendant. In the District of Columbia a decree of absolute divorce does not take effect until the expiration of six months after its entry (D. C. Code Title 16, Sec. 421). The alleged assault is averred to have taken place during this six months' interval. To be sure, in the meantime the marriage is not entirely dissolved. Nevertheless, the status of husband and wife lacks its

UNION PACIFIC RAILWAY COMPANY v. CAPPIER

Supreme Court of Kansas, 1903. 66 Kan. 649, 72 P. 281, 69 L.R.A. 513.

SMITH, J.: This was an action brought by Adeline Cappier, the mother of Irvin Ezelle, to recover damages resulting to her by reason of the loss of her son, who was run over by a car of plaintiff in error, and died from the injuries received. The trial court, at the close of the evidence introduced to support a recovery by plaintiff below, held that no careless act of the railway company's servants in the operation of the car was shown, and refused to permit the case to be considered by the jury on the allegations and attempted proof of such negligence. The petition, however, contained an averment that the injured person had one leg and an arm cut off by the car-wheels, and that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the side of the tracks and bleed to death. Under this charge of negligence a recovery was had.

While attempting to cross the railway-tracks Ezelle was struck by a moving freight-car pushed by an engine. A yardmaster in charge of the switching operations was riding on the end of the car nearest to the deceased and gave warning by shouting to him. The warning was either too late or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yardmaster signaled the engineer to move ahead, fearing, as he testified, that a passenger-train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yardmaster was informed of the accident and an ambulance was summoned by telephone. The yardmaster then went back where the injured man was lying and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later and Ezelle was taken to a hospital, where he died a few hours afterward.

In answer to particular questions of fact, the jury found that the accident occurred at 5:35 P. M.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started

original character. It has been held that the sole purpose of postponing the effective date of the final decree is to preclude remarriage with its possible consequences, during the pendency of any appeal that may be taken, *Tillinghast v. Tillinghast*, 58 App. D. C. 107, 25 F.2d 531. The law does not contemplate that the marriage relationship shall continue until the expiration of the six months' time. In the interim the marriage status is held in suspended animation."

at 6:05 P. M. and reached the nearest hospital with Ezelle at 6:20 P. M., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer:

"Ques. Did not defendant's employees bind up Ezelle's wounds and try to stop the flow of blood as soon as they could after the accident happened? Ans. No."

The lack of diligence in the respect stated was intended, no doubt, to apply to the yardmaster, engineer and fireman in charge of the car and engine.

These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quotes the language found in Beach on Contributory Negligence, third edition, section 213, as follows:

"Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person."

The principal authority cited in support of this doctrine is *Northern Central Railway Co. v. The State, use of Price et al.*, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road-crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had

revived from his stunned condition and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead but still warm, having died from hemorrhage of the arteries of one leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's station-house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish.

The Maryland case does not support what is so broadly stated in *Beach on Contributory Negligence*.¹ It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the negligence of bailees (ch. xx), indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person.

After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow.² We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrong-doing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial

¹ Bohlen, *Studies in the Law of Torts*, 325-326 (1926): "On the whole, it may be said that the case is based upon the principle that irrespective of whether or not a duty exists to aid those whom one has innocently injured, if one does gratuitously assume control of the situation, whether out of kindness or because it is necessary to remove the injured person in order that one may freely prosecute one's own affairs, there does arise a duty analogous to that imposed upon a gratuitous bailee of goods—a duty to exercise common humanity that one shall not by his interference make bad worse. It does not, therefore, tend to support the existence of any legal duty to repair harm innocently caused."

² *Griswold v. Boston & Maine Railroad*, 183 Mass. 434, 437, 67 N.E. 354 (1903): "The case of *Dyche v. Vicksburg, Shreveport & Pacific Railroad*, 79 Miss. 361, 30 So. 711, proceeds upon the singular ground that if a railroad company, though not in fault in injuring a trespasser, assumes charge of him, there is imposed on it the duty of common humanity, and whether it has performed this duty is a question for the jury. We cannot accede to the doctrine of this case. If it is law, no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly or with more judgment. It is a doctrine which would allow an action against a good Samaritan and let a priest and a Levite go free." For a collection of recent cases, see Note, 120 A.L.R. 1525 (1939).

cognizance.³ For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. . . .

Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of, and care for, the wounded man in such a case, how could a duty arise under the circumstances of the case at bar? In *Barrows on Negligence*, page 4, it is said:

"The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned; . . . and the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public.

"This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position,—as a drowning child,—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril." (See, also, *Kenney v. The Hannibal & St. Joseph Railroad Company*, 70 Mo. 252, 257.)

In the several cases cited in the brief of counsel for defendant in error to sustain the judgment of the trial court it will be found that the negligence on which recoveries were based occurred after the time when the person injured was in the custody and care of those who were at fault in failing to give him proper treatment.

³ Cf. *Buch v. Amory Manufacturing Co.*, 69 N.H. 257, 260, 44 A. 809, 76 Am. St. Rep. 163 (1897): "Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the railway company.

All the Justices concurring.⁴

NOTES

(1) *Kimber v. Gas Light and Coke Company*, [1918] 1 K. B. 439, 446-447 (Ct. App. 1918): "Scrutton, L. J. read the following judgment:—Two workmen of the Gas Light and Coke Company were altering the gas fittings in a house which had been let to a tenant, who was converting it into two flats, one of which he proposed to let. In doing this the workmen had taken up a board on a dark landing. While the workmen were still in the house and the board was up, a lady, to whom the tenant had given an order to view the top flat, knocked at the door. One of the workmen opened it; she showed her order to view and passed in up the stairs. The workman did not tell her of the hole where the board was up. She passed it once, but fell into it on her return, and damaged her knee. She sued the gas company. The jury found there was no negligence in leaving the hole open, but that there was negligence in not warning the plaintiff that the hole was there; and that the plaintiff was not guilty of contributory negligence. The judge, to whom other questions were left, found that the hole was a trap, i.e., a danger which could not be avoided by a person previously ignorant of it, but who used reasonable care; and entered judgment for the plaintiff. The gas company appeal. . . .

" . . . There are, of course, cases where there is moral culpability, but no legal liability. A. sees a blind man walking along the highway straight into a pond, and gives him no warning; A. is not legally liable, for he is under no legal duty to B. But if A. has himself made the hole in the highway, he is under legal liability at once: *Penny v. Wimbledon Urban Council* [1899] 2 Q. B. 72. I cannot see that it makes any difference that B. is a person lawfully on private premises where A. has made the hole, or that A. is under a duty as to his acts towards B., such as not to hit him with his tools, different from his duty to warn B. of dangers A. has created, which are not discernible by reasonable care on the part of B. It is A.'s duty to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B., who is going towards a hidden danger A. has created. . . ."

⁴ Cf. *Buch v. Amory Manufacturing Co.*, *supra* note 3, at 261: "There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law." Cf. *Harris v. Pennsylvania Railroad Co.*, 50 F.2d 867 (C.C.A. 4th 1931); *Warshauer v. Lloyd Sabaudo S. A.*, 71 F.2d 146 (C.C.A. 2d 1934).

(2) *Carey v. Davis*, 190 Iowa 720, 721, 724, 726, 180 N. W. 889, 12 A. L. R. 904 (1921): Plaintiff was employed by defendants as a farm laborer. While excavating a gravel pit he fainted. Defendants caused him to be removed to and laid in a near-by wagon box where they left him, unattended for four hours. "He charges defendants with negligence in failing to give him reasonable care in his sick and helpless condition, and in aggravating his suffering by placing him in the wagon box, exposed to the rays of the sun and to the effect of weather conditions, whereby he became sick." He did not charge defendants with responsibility for his initial prostration. (i) "Assuming the truth of his petition, he became suddenly ill, prostrate, and helpless, in the defendant's immediate presence. Does it put any undue strain upon the law of master and servant to hold that, under such circumstances, the master was required to make some reasonable effort to render him the aid his immediate necessities demanded? We are disposed to think not."⁵ (ii) Moreover, "after they had assumed to pick him up in his unconscious condition, and remove him from the place where he had fallen, it then became their duty to use reasonable care in so doing not to aggravate his misfortune." "One person, seeing another in distress, may or may not be under legal obligation to afford him relief; but if he does undertake it, he is, of course, bound to act with reasonable prudence and care, to the end that, if his effort be unavailing, it shall at least not operate to increase the injury which he seeks to alleviate."⁶

PROBLEM

What were the circumstances which made it possible for plaintiff, in the following case, to invoke the substantive law of fifteen states in his attempt to state a cause of action?

Sidis v. F-R Publishing Corporation, 113 F. 2d 806, 138 A. L. R. 15 (C. C. A. 2d 1940): "William James Sidis was the unwilling subject of a brief biographical sketch and cartoon printed in *The New Yorker* weekly magazine for August 14, 1937." The article is "merciless in its dissection of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which

⁵ It has been held that the duty arises only in the case of dangerous or hazardous employments. *Cushman v. Cloverland Coal & Mining Company*, 170 Ind. 402, 84 N.E. 759, 16 L.R.A., N.S., 1078 (1908). Cf. *Hunicke v. Meremec Quarry Company*, 262 Mo. 560, 172 S.W. 43, L.R.A. 1915C, (1914); *Troutman's Adm'x v. Louisville & Nashville Railroad Company*, 179 Ky. 145, 200 S.W. 488 (1918).

⁶ Cf. *Schichowski v. Hoffmann*, 261 N.Y. 389, 394-395, 185 N.E. 676 (1933): "Our concepts of legal duties are not static in a changing world. They grow and change as new conditions arise; as life becomes more complex in its social relations; as the social conscience of the community imposes upon its members new obligations or frees them from old obligations. The field in which a man may with impunity cause damage to another for his own selfish ends has been restricted by statute and, at times, even by judicial decision. The field in which a man may be held liable for failure to take affirmative action to avert from another damage which may arise from causes which he has not created has not been greatly enlarged."

See Bohlen, *The Moral Duty to Aid Others As a Basis of Tort Liability*, 56 U. of Pa. L. Rev. 217, 316 (1908), reprinted in Bohlen, *Studies in the Law of Torts*, 291 (1926); Prosser, *Torts*, 192 ff. (1941).

he has gone to avoid public scrutiny." Sidis brought an action, based upon this article, in the United States District Court for the Southern District of New York. His complaint "stated three 'causes of action': The first alleged violation of his right of privacy as that right is recognized in California, Georgia, Kansas, Kentucky, and Missouri; the second charged infringement of the rights afforded him under §§ 50 and 51 of the N. Y. Civil Rights Law (Consol. Laws, c. 6); and the third claimed malicious libel under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania, and Rhode Island." The complaint alleged that The New Yorker was "a weekly magazine of wide circulation throughout the United States." The District Court granted defendant's motion to dismiss the first two "causes of action," and plaintiff appealed from the order of dismissal. With reference to the first cause of action the Circuit Court of Appeals said: "Under the mandate of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, we face the unenviable duty of determining the law of the five states on a broad and vital public issue which the courts of those states have not even discussed." *Affirmed.*

BOOK II. STATING A CAUSE OF ACTION

Chapter V

THE SUBSTANTIVE ADEQUACY OF THE FACTS STATED

SECTION 1. FACTS AND PROPOSITIONS

ELSTON v. WILBORN

Supreme Court of Arkansas, 1945. 208 Ark. 377, 186 S.W.2d 662.

Action of ejectment by Harvey Lee Wilborn and others against Jesse Elston and others, claiming that plaintiffs were entitled to possession of a church building and property, wherein defendants filed a cross-complaint and moved to transfer the case to equity, which was done. From an adverse decree, defendants appeal.

Reversed and remanded.

McFADDIN, JUSTICE. This appeal involves a dispute between rival factions of a Negro Congregation in Cotton Plant, Arkansas. Many questions are mentioned by appellants, such as the calculation and disposition of the tithe, the form of church government, the right of the pastor to "disfellowship" a member, and other issues of doctrine. Judicial tribunals must leave such matters to ecclesiastical writers. In the United States of America, where Church and State are separate, the courts have steadily asserted their refusal to determine any controversy relating purely to ecclesiastical or spiritual features of a church or religious society. The courts intervene only to protect the temporalities of such bodies, and to determine property rights. 45 Am. Juris. 768.

The decree of the chancery court held that the church here involved i.e., the Church of God in Christ at Cotton Plant—was a congregational church; and in that one finding both sides seemed to agree.

So far as we know, churches in the United States may be classified, as regards the form of church government, into four groups: papal, episcopal, presbyterial, and congregational. See *Encyclopedia Britannica* 14th Ed.: Vol. 17, p. 194 et seq.; Vol. 8, p. 659; Vol. 18, p. 440 et seq.; Vol. 6, p. 246 et seq.; see also *Encyclopedia Americana* 1937 Ed.: Vol. 21, p. 251; Vol. 10, p. 429; Vol. 22, p. 540; and Vol. 7, p. 501. This is a controversy between factions in a congregational group, and noth-

ing herein relates to religious societies or churches governed by any one of the other forms of church government. In congregational groups the affairs are determined by the vote of the majority of the members. The rule is stated in 45 Am. Juris. 764: "Thus, when a church strictly congregational or independent in its organization, is governed solely within itself, either by majority of its membership or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and holds property either by way of purchase or donation, with no other specific trust attached to it than that it is for the use of the church, the numerical majority of the membership of the church may ordinarily control the right to the use and title of such property. The principle of majority control is, however, limited to independent or congregational societies, and is not to be extended to societies belonging to an ecclesiastical system."

For cases in our own court involving congregational church government, see *Monk v. Little*, 122 Ark. 7, 182 S. W. 511, and *Young v. Knox*, 165 Ark. 129, 263 S. W. 52. With the above as background information, we proceed to this case.

The appellees are Harvey Lee Wilborn, James Prator, and Otis Hampton. They filed this action in ejectment in December, 1941, claiming to be the trustees of the Church of God in Christ at Cotton Plant, and, as such trustees, to be the owners and entitled to possession of the church building and property. These plaintiffs alleged that the defendants wrongfully withheld possession. Defendants (appellants here) were Jesse Elston, Johel Leaks, and J. E. Bowe. There were other defendants, but they are not interested in this appeal. The defendants filed answer and cross-complaint, and moved to transfer the case to equity, which was done; and issue was joined on which group—plaintiffs or defendants—represented the majority faction in the church.

The chancery court, after hearing the evidence, made an order on June 13, 1944, calling an election to determine the majority faction. Commissioners were appointed to hold the election, and it was set for August 13, 1944 at the church building; and only those persons who were members of the Church of God in Christ at Cotton Plant on June 1, 1941 were eligible to vote in the election. The purpose of the election was to name three trustees of the congregation. On September 11, 1944 the report of the election was received by the court, and on that report the chancery court entered a final decree holding the appellees to have been duly elected, and awarded

the appellees, as such trustees, the church property because of the said election. From that decree there is this appeal.

The issue to be tried in the chancery court was whether the plaintiffs, at the time of filing the suit, were the duly elected trustees of the church. If they were, they had the right to maintain this suit. Section 11369, Pope's Digest. Otherwise the decree should have been against them. The determination of the question should have been on the basis of the facts as they existed prior to the filing of this suit. In 1 Am. Juris. 451 the rule is stated: "A cause of action must exist and be complete before an action can be commenced; the subsequent occurrence of a material fact will not avail in maintaining it. The rights and liabilities of the parties—that is, the rights to an action or to judgment or relief—depend upon the facts as they existed at the time of the commencement of the action, and not at the time of the trial."

To the same effect see *Horner v. Hanks et al.*, 22 Ark. 572, where this court said: "The law is expressly written that the right of a plaintiff must be adjudicated upon as it existed at the time of the filing of his bill. *Adams Eq.* 413, *Barfield v. Kelly*, 4 Russ. 359."

See also *Shreve Chair Co. v. Manufacturers Furniture Co.*, 168 Ark. 756, 271 S. W. 954; *Mazaika v. Krauczunas*, 229 Pa. 47, 77 A. 1102, 31 L. R. A., N. S., 686; *Judkins v. Tuller*, 277 Mass. 247, 178 N. E. 540. In 1 C.J.S., Actions, § 125, p. 1389, et seq., the same rule is stated, with the amendment that in some equity cases, the filing of supplemental pleadings will allow proof of supplemental facts. But, even so, in the case here there were no such supplemental pleadings filed. The only pleadings were the original complaint and the answer and cross-complaint.

The Chancery Court called an election to vote for three trustees, and at that election the appellees received a majority. But that election could not determine the question, because it was held nearly three years after the suit had been filed. Solely on the result of the election, the chancery court decided for the appellees.

The case of *Mazaika v. Krauczunas*, 229 Pa. 47, 77 A. 1102, 1103, 31 L. R. A., N. S., 686, is the nearest case in point that we have been able to find. There, as here, a dispute arose as to who was the trustee of the Congregation when the suit was filed, and the chancellor called an election, and decided the case on the result of that election. The Supreme Court of Pennsylvania said: "Instead of meeting the issues

raised by the pleadings, pursuant to an agreement entered into between the parties, the chancellor proceeded to hold a new election, to determine whom the majority preferred to have act as trustee of the title. . . . Here was a clear abdication of judicial function and authority. . . . It is the proper function of a chancellor to resolve such doubtful questions in the light of the evidence, not to avoid them by reaching a solution of the controversy through methods for which there is no legal warrant. . . . The decree entered in the case rests exclusively upon the result derived by the chancellor from the election held before him. Not only had the election no relation to the congregational meeting, but it was not ordered by the congregation, The case must go back, to be proceeded with *sec. reg.*, the contending parties to be allowed to introduce such testimony as they can touching the issues raised under the pleadings. From that testimony let the facts be found, and then, should an appeal to this court follow, we will be in a position to make final ruling, but not until then."

We think the reasoning of the Pennsylvania case is sound, and we follow it. We do not mean that an election can never be called. If—for instance—a complaint should be filed stating that by force, threats, etc., the desire of the majority could not be ascertained, then a court could properly decree a clear election—not to decide the result of a pending case, but as granting the relief prayed, *i.e.*, a clear election. But that is not the case before us. Here the chancery court entered a decree based solely on the result of the election.

It follows, therefore, that the decree is reversed and the cause remanded for a trial and decree on the question, whether the plaintiffs, at the time they filed the ejectment suit, were the duly elected trustees of the church, and also for the court to determine whether there is any merit to the lien claimed by appellant *Bowe* in the cross-complaint.¹

¹ *Cf. Butler v. Frontier Telephone Co., supra* p. 33. See N. Y. Civ. Prac. Act, § 245; Clark, *Code Pleading*, 741-744 (2d ed. 1947).

FIRST REPORT OF HER MAJESTY'S COMMISSIONERS FOR
INQUIRING INTO THE PROCESS, PRACTICE, AND
SYSTEM OF PLEADING IN THE SUPERIOR
COURTS OF COMMON LAW

1851.¹ 11-16.

We now arrive at that part of our duty which is by far the most difficult and anxious, the consideration of the subject of PLEADING. . . .

Before we proceed to consider the different views entertained on this subject, and to state the alterations which we deem necessary, it will be convenient that we should shortly state what is meant by the Pleadings in an action at law. They are written statements made by the plaintiff and defendant of their respective grounds of action and defence. The object is to ascertain what are the matters really in controversy between the parties, so as to avoid all discussion and inquiry on those which are not so,—thus simplifying the matter for the decision of the Judge or jury, and saving the parties unnecessary expense and trouble. To accomplish this object, the plaintiff in the first place is required to state the facts which constitute his cause of action. The defendant is required to answer, and in so doing is compelled, at his option, to take one of the following courses: either he denies the statement of the plaintiff; or, confessing it, avoids its effect by asserting some fresh fact; or, admitting the facts alleged, he denies the legal effect of them as contended for. In the second case put, the plaintiff will be under the like necessity, and will have to reply to the fresh matter of fact alleged by the defendant, subject to the same rule. In like manner, if necessary, the defendant rejoins; and so the parties proceed till it is ascertained that there is some fact asserted by the one side and denied by the other, or that there is some proposition of law affirmed on the one hand and denied on the other. The questions so raised are called issues in fact or in law, as the case may be. The following example will afford a sufficient illustration of the system. Let us suppose that the plaintiff complains in his declaration of an assault by the defendant. If the defendant in his plea denies it, an issue in fact is at once raised; if, admitting the fact of the assault, he pleads that he committed it in self-defence, here, nothing being as yet

¹ The student should note the date of this report which had reference to the system of pleading which then existed in England, and he should consider, as the course proceeds, whether that system in fact had the virtues attributed to it by the report.

denied, no issue would be raised. But, fresh matter being alleged, the plaintiff is called on to reply to it: if he denies the truth of the plea in his replication, the parties will be at issue; but he may admit the plea to be true, and say that he assaulted the defendant to protect his (the plaintiff's) goods from being carried away by the defendant: the defendant, again, may deny this, or say that the goods were on his land, and that he was in the course of removing them; again, the plaintiff may deny this, or may say that he had the defendant's license to put them there, till at length one party will be compelled to deny the other's statement, and so an issue will be raised. Or, one of the parties may admit the truth of the other's statement, but deny its legal sufficiency as an answer: for instance, in the case put of a verbal license being set up, the defendant might object to the plea on the ground that in law a licence for such a purpose should be by deed or in writing, and thus would arise an issue in law. So, in an action on a bill of exchange, the defendant may admit every statement of the plaintiff, but plead that time was given to some other party to the bill, whereby he, the defendant, was discharged. By these means clear and precise questions are evolved, and the parties know what are the points in dispute: for example, in the case first put, if the defendant simply denies the assault, the plaintiff knows that this is all that is in controversy; if the defendant pleads that he committed the assault in self-defence, and the plaintiff denies that, they both know that there is no other question between them. So in the case secondly put, the plaintiff has not to prove the drawing, accepting, or presenting of the bill, the defendant's handwriting to it, the several endorsements whereby the plaintiff became entitled, or its dishonour. The defendant is to prove the fact which he has pleaded; if he fails to do so, the plaintiff is entitled to recover.

Such is the groundwork of the English System of Pleading. It is obvious that there are many advantages in it; the parties are not taken by surprise, they know precisely what is in dispute, and the expense is saved which would otherwise be incurred in coming prepared to prove matters not intended to be controverted. Moreover, as, by the law of England, questions of fact are determined by a jury, and questions of law by the Court, it is essential, as far as possible, to keep those questions distinct, so that each may be referred to the proper tribunal. Such are the results effected by *pleading*, which, thus explained, appears not only not open to objection, but entitled to great admiration and praise for its simplicity and usefulness. This,

however, is the bright side of the subject, and it cannot be denied that on a system so simple and sound in principle defects and abuses have been engrafted which have gone far to destroy its utility. This has arisen in great measure from an over-anxiety to ensure exact precision and certainty, and from the rigorous character of the rules introduced for the attainment of these objects. Some degree of strictness, no doubt, is necessary. The fraudulent litigant must be made to be clear; he must be prevented from being ambiguous and tricky; he must be brought to a question, and not allowed to mix up a variety of statements from which no one can ascertain the case upon which he relies, either in point of law or of fact. But unhappily the rules framed to prevent these mischiefs have been abused, and they and certain arbitrary regulations and forms have caused the existence of those objections to the practice of special pleading, the justice of which we thoroughly feel. . . .

Before, however, we address ourselves particularly to the defects complained of and the remedies which we propose, we must dispose of a preliminary question, namely, whether any pleadings or preparatory statements by the parties to a cause should be required. Some persons, irritated by the mischiefs which have followed from the abuse of technical rules, have proposed that parties should come into Court without any previous authentic information as to the complaint or answer. From this we wholly dissent. Such a mode of or rather want of, procedure, may answer the purpose in a rude state of society or in matters of very trifling moment, in which from the nature of the case the parties know before hand the precise matter in dispute; but in a highly civilized state, where commercial transactions are numerous and complicated, it would lead to intolerable fraud, oppression, and expense; and we believe that it has never existed in the code of any civilized nation. Dishonest plaintiffs would make unfounded claims, the nature of which could not be ascertained by previous inquiry. The party summoned must either come prepared with all the witnesses who could depose to anything that had ever passed between him and the plaintiff, or must hear the complaint, and then be entitled to an adjournment to bring his witnesses at a future day. In the former case, great and unnecessary expense would be incurred, and frequently incurred with a view to oppression. In the latter case there would, in truth, be a notice given by word of mouth before the Judge, which had much better have been previously given. In many cases, an adjournment would be necessary for the purposes of justice, but dishonest defendants would equally claim it, and every case would be something like twice tried, each party

being at the expense and trouble of twice attending with witnesses. But we do not believe that any one, on reflection, will be found seriously to support this plan; and we, therefore, at once pass on to the next question, viz., What should be the nature of the notice which the parties should give to each other?

Some persons, whose opinions are entitled to respect, think that a general notice of the plaintiff's claim and of the defendant's defence would answer every good purpose: for instance, the plaintiff's declaration or statement to be thus:

"The plaintiff complains that the defendant did not pay a bill of exchange for 50*l*."

The defendant's plea:

"The defendant says he is not liable on the bill."

If a plaintiff might declare in this way, it would follow, that it never would be ascertained by the pleadings whether the plaintiff had a sufficient cause of action or not; and such a general plea would leave it uncertain whether the defendant denied the acceptance of the bill, or any other of the legal requisites to make him at one time liable; or whether, admitting these, the defendant meant to set up in defence some additional matter by way of answer, as that the bill had been fraudulently obtained from him; nor, where the whole matter in dispute was a question of law, could it ever be disposed of as such, but every case would have to be brought before a jury before it could be ascertained that there was no fact in dispute. Many of the evils, therefore, of giving no notice at all would exist in these cases; much expense would be incurred; parties would go prepared to prove everything relating to the case in question, though only one matter was really in dispute, and very often would find they came unprepared with proof on some point which had escaped attention until noticed by their adversary. If the system of giving a general notice were universally permitted, applications for new trials on the ground of surprise would greatly increase,—a serious evil in itself, as attended with waste and vexation. . . . It may be admitted, that there would be less liability to technical mistake in the first instance; but we think this advantage is more than counterbalanced by those to be derived from the present system of pleading, especially when the latter shall have undergone those changes which we propose with a view to prevent the captious and technical objections which can now be made. Upon the best consideration we have been able to bestow upon the matter, we are satisfied that a substitution of notices for the present mode of pleading would not be an improvement, but, on the contrary, a serious disadvantage. We therefore think, that the plaintiff should be required to state his title to sue, and

the nature of his cause of action; that the defendant should likewise be required to state his ground of defence with certainty and precision. This is really the substance of pleading, the object of which, as we have before stated, is to ascertain the points in controversy, with the view of informing the parties themselves and the tribunal which is to decide between them what are the real questions to be disputed.

NEW YORK CIVIL PRACTICE ACT

§ 241. Pleadings; What to Contain. Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition on which the party pleading relies, but not the evidence by which they are to be proved.

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1248-1251.*

Parties are sometimes said to dispute a question of law or a question of fact, or both. A question must have at least two answers, and if it is the kind of question of fact which we have previously called a dilemmatic question, it will have only two answers, the answers being a pair of contradictory propositions. Every dilemmatic question is the locus of a possible dispute, which actually occurs when individuals give opposite answers to the question, that is, allege and traverse the same answer or allege contradictory answers. When it is said that a question of fact is being disputed, what must be meant is that the question has been so answered by two individuals that a dispute exists between them with respect to a matter of fact.¹ But this must not be interpreted to mean that a fact is being disputed or that a dispute consists in an opposition of facts. To make this clear it becomes necessary to distinguish between a fact and a proposition of fact.

Words are used to symbolize and express questions, as they are used to symbolize and express answers to questions. On the level of language we can distinguish between interrogative and declarative sentences; with respect to what is symbolized by language, we can distinguish between questions and propositions. A proposition is always one of a pair of contradictory answers to a dilemmatic question. Such questions can therefore

* This and all other extracts from this article quoted in this book are included by permission of the Columbia Law Review. All footnotes are the authors' but they have been re-numbered.

¹ Strictly, of course, it is inaccurate to say that a question is disputed, if what is meant is that one party affirms and the other denies the question.

always be transformed into dilemmas constituted by contradictory propositions.² A question of law is answered by a rule of law; the question can be stated in the form of a dilemma by "Either R is or is not tenable as the rule of this case." Litigants join in an issue of law by taking the opposite horns of this dilemma. The judge resolves this issue by holding R to be the rule of the case or by rejecting R as not tenable. A question of fact is answered by contradictory propositions of fact, one of which must be true, and the other false. When the jury resolve an issue of fact made by the allegation and traversing of P or the allegation of P and the allegation of not-P, they do so by asserting one of these two propositions to be true and the other false.³

It is generally admitted that the jury can render an erroneous verdict in the sense that a proposition of fact which they assert to be true may in fact be false. Propositions are not actually true because we assert them to be true, even though we assert them to be true in good conscience because in the light of our knowledge we believe that they are actually true. By the actual truth or falsity of a proposition we mean its agreement or disagreement with the fact. By the asserted or assertoric truth or falsity of a proposition we mean the value we assign to the proposition in the light of our knowledge. But our knowledge is always expressed in propositions. It is clear then that we cannot make a direct comparison of fact and proposition of fact to determine their agreement or disagreement. We answer questions of fact, we solve disputes about matters of fact, by asserting propositions of fact as true and their contradictories as false. The choice here is not between a fact and the opposite fact, but between opposed propositions about the same fact. For every pair of contradictory propositions there is only one fact, and it is the singularity of this fact which makes it inevitable that one of the contradictory propositions must be true, and that both cannot be. At the stage of pleading the parties to an issue of fact claim to know what the fact is. They differ, but there are not two different sets of facts if by a fact is understood that

² Thus, "Was the document signed?" is a dilemmatic question which can be transformed into the dilemma, "Either the document was signed or the document was not signed." This indicates that the proposition, "The document was signed," and its contradictory, "The document was not signed," are the two possible answers to the question, and the only two.

³ While the jury will never assert a proposition as true and its contradictory as false, that, of course, is the effect of their verdict since if one of a pair of contradictory propositions is asserted as true the other must be asserted as false, and *vice versa*. Moreover, it is only when their verdict takes the form known as a special verdict that the jury expressly assert material propositions to be true or false. A general verdict is a finding for one or the other of the parties rather than an answer to one or more specific questions of fact; but the general verdict must nevertheless be interpreted as an assertion of the material propositions of one party as true, and the assertion of their contradictories as false.

which is actually the case, that which has happened, or that which exists or has existed.

The easiest way in which to grasp the nature of fact is in terms of a pair of contradictory propositions of fact. If both are affirmed, the individuals asserting them to be true claim to know what the fact is, but one of them must be in error. The fact is that which is reported by that one of the two contradictory propositions, capable of being made about it, which is actually true. Thus, let us suppose that A affirms the proposition "John is dead" and B affirms "John is not dead," that is, denies "John is dead." There are not two facts being reported, because either John is dead or John is not dead; John cannot be both. Hence, the fact is that which is reported by that one of the two contradictory propositions which is true. How we know which of the two propositions is true, how we come to be able to affirm it and to deny the other, is a different matter. When we affirm one of the two propositions we are assigning truth as its value, but it must always be remembered that we may be in error, that in fact it may be false.

Further, it must be pointed out that a proposition of fact is a proposition about a particular thing or a particular happening. The subject of a sentence which symbolizes a proposition of fact is always a proper name or a descriptive phrase which uniquely designates some particular. We call such propositions elementary to distinguish them from general propositions which are about kinds of things rather than about any particular instance of a kind.⁴ It will be remembered that we call a rule of law a general statement because it refers to kinds of factual conditions upon which legal consequences depend rather than to any particular instances of these conditions.⁵ General propositions are strictly not propositions of fact in the sense that they do not report matters of fact. A fact always involves some individual

⁴ This distinction can be illustrated by the following examples of elementary and general propositions. Such sentences as "John Smith was not in London last Saturday," "The document which he signed yesterday cannot be found," "This piece of cloth is linen," symbolize elementary propositions. Such sentences as "Students of one foreign language easily learn another," "Humidity is a greater source of discomfort than heat," "Things equal to the same thing are equal to each other," symbolize general propositions. Careful grammatical analysis is often required to determine whether an English sentence symbolizes a single proposition or a conjunction of propositions, whether the one or more propositions symbolized are elementary or general, and further to determine precisely the subject and predicate terms of the proposition symbolized.

⁵ It will be noted that we have avoided referring to a rule of law as a proposition. Propositions express knowledge and as such they are capable of being either true or false. Rules of law do not express knowledge; they are either just or unjust, but not true or false. Nevertheless, we can distinguish grammatically between legal statements which are general and legal statements which are elementary in character. Rules of law are always general legal statements; legal decisions and judgments are elementary legal statements.

thing, unique in its individuality, or some unique and singular occurrence. The world of facts is independent of our knowledge; it is whatever is actually the case.⁶ But what we know of the world of facts is expressed in those elementary propositions which we assert as true or probable. We shall come presently to a discussion of probability.

We are now able to distinguish two meanings which the word "allegation" has in traditional usage. It means, first, that which is alleged, a proposition of fact; and, second, the act of alleging, which is the claim that the proponent of a proposition makes for it, namely, that it is true. That the act of alleging and what is alleged are different can be seen in that the act is the same in nature for two or more different propositions, and in that the same proposition can be alleged and traversed. Just as alleging a proposition is claiming that it is true, so traversing a proposition is claiming that it is false. In other words, one party would like the tribunal to assert the proposition as true, that is, affirm it, and the other would like the tribunal to deny it, that is, assert it as false. Whether the desire of the one or the other is to be satisfied, whether the claim of the one or the other is to be upheld, is what is submitted to trial for the sake of obtaining the jury's verdict. The jury's verdict is a finding that one party is right in alleging or the other right in traversing a given proposition, and therefore they assert it as true or false. In other words, the allegation and traversing of a proposition of fact forms an issue of fact, and the jury's verdict resolves that issue, by deciding between the opposed claims as to the value of the proposition. From the point of view of the trial as a whole, it is the jury's verdict that affirms or denies the proposition which is the subject of dispute. The pleadings do not affirm or deny, but call upon the tribunal to decide between opposing claims for affirmation or denial.⁷

⁶ When we say that general propositions are not propositions of fact, we mean to indicate that they are not about particular existences. This must not be interpreted to mean that general propositions do not express knowledge about the world or whatever is. Their actual truth or falsity is their agreement or disagreement with that which is, in the same way as the truth and falsity of elementary propositions of fact.

⁷ The reader must remember that we are using the words "allege" and "traverse" and the words "affirm" and "deny" to distinguish between the claims which parties make in the pleadings with respect to a material proposition and the assertion of that proposition as a result of the trial of the issue.

SECTION 2. THE TEST OF THE SUBSTANTIVE ADEQUACY OF THE FACTS STATED

BLISS, CODE PLEADING

3d ed. 1894. §§ 136-137.*

No system of pleading can be devised that requires a statement of the facts that constitute the cause of action, or of facts that constitute a defense, where the statement itself does not imply a proposition of law. If the proposition be false [or if the statement of facts fails to involve the implied proposition of law], the pleading is radically defective, and no judgment can rest upon it [for it must be remembered that the courts do not give relief for every wrong, nor for every statement of facts upon which men differ]. Issues may be tendered, either upon the truth of the facts or upon the existence of the proposition [of law] involved. The former is called an issue of fact, the latter an issue of law, and both are tendered by denials—the issue of fact by a denial of the facts [by answer], or of some material fact stated; the issue of law by a denial in effect of the proposition of law, the proposition implied, but never stated [by a demurrer].

Every statement of facts constituting a cause of action, or a defense, is but part of a logical formula—the minor premise, or second member of a syllogism, and the proposition of law involved is the major premise, or the first member. The latter is denied by a demurrer; the former is denied, or avoided, by an answer.

To illustrate: A. sues B. and states that B. agreed to give him a certain horse worth \$100, but refuses to do so, and asks damages. B. demurs, and says the facts stated by A. do not constitute a cause of action. The statement of A. involves the following syllogism:—

1. Major Premise.—Whoever promises to give property to another, is liable to him in damages if he refuses to do that which he has promised.

2. Minor Premise.—Defendant, B., agreed to give the plaintiff a certain horse, and afterwards refused to do so.

3. Conclusion.—Therefore B. is liable to the plaintiff in damages.

The demurrer of B. denies the first proposition: [that is, in effect says that the facts as stated are not sufficient in law to

* By permission of West Publishing Company, the publisher.

show a legal liability on his part], and the plaintiff goes out of court.

But if A. had alleged that he had paid B. \$100 as the price of a certain horse which the latter agreed to deliver to him, but refused to do so,¹ then the major premise would be such that B. would not risk a demurrer, but would answer, and either deny the facts charged—that is, the minor premise—or admit them, and state some new matter showing that notwithstanding there is no liability. This statement of new matter in confession and avoidance is but the minor premise of a new syllogism, also involving its major as a proposition of law. If this new matter in defense is deemed insufficient, the plaintiff will demur, and will thus, as with the defendant's demurrer, deny the major premise. But if he replies, he will deny, or avoid by new matter, the minor premise—that is, the facts stated in the answer.

To further illustrate: Suppose to A.'s allegation of the consideration and the agreement, B. should answer and state that A. subsequently told him that he need not deliver the horse as he had agreed to do, then we have the following syllogism:

1. Major Premise.—One who makes a contract is discharged from his obligation if the other party says to him that he need not perform it.

2. Minor Premise.—The plaintiff told the defendant that he need not perform the agreement sued on.

3. Conclusion.—Therefore the defendant is not liable for its breach.

The plaintiff, in demurring to the answer, denies the first premise—the proposition of law—and will take judgment upon the issue of law.

If, however, the defendant had stated that plaintiff had accepted a yoke of cattle in full satisfaction of the agreement, he makes a defense that cannot be demurred to, because the proposition of law involved cannot be denied. The plaintiff will then, perhaps, deny that he accepted the cattle in satisfaction, which makes an issue of fact; or, he may reply that the defendant, to induce him to accept the cattle, warranted them to be kind, well

¹ [Then we would have the following syllogism:

[1. Major Premise.—Whoever promises, upon consideration, to transfer the title of property to another, is liable to him in damages if he refuses so to do.

[2. Minor Premise.—The defendant, B., agreed, upon consideration, to give the plaintiff certain property, and afterwards refused so to do.

[3. Conclusion.—Wherefore B. is liable to the plaintiff in damages.

[All pleading is a logical science. Coke said, "The law itself speaketh by good pleading," as if pleading were the living voice of the law. It would seem, then, that a student can scarcely become a good pleader without first being a thorough lawyer. He must thoroughly understand the controlling legal principle, or major premise, on which he founds his claim or demand.] . . .

broke, and ruly, when in fact they were vicious, unruly, etc., and that he had delivered, or tendered them back. This reply of new matter, as well as the answer of new matter, which it meets, involves a proposition of law as the first premise of a new syllogism, which it is unnecessary to give. The defendant will hardly demur to it—that is, deny the legal proposition involved—and, as no rejoinder is allowed by the Code, it is supposed to be denied; or, he may avoid it by evidence of facts which, if pleaded, would have made a special rejoinder.

PROBLEMS

1. What were the major premises of the statements of the causes of action in *Manko v. City of Buffalo*, *supra* p. 134, *Keister's Adm'r v. Keister's Ex'rs*, *supra* p. 145, *Daily v. Parker*, *infra* p. 172, and *Bowen v. Mewborn*, *infra* p. 172, and of the second specification of negligence in *Union Pacific Railway Company v. Cappier*, *supra* p. 151?

2. What were the minor premises and what were the conclusions?

3. Does a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action create an issue of substantive law or an issue of procedural law? How does it create such an issue?

4. By what criterion can it be determined whether or not a complaint states facts sufficient to constitute a cause of action?

NOTES

(1) *Daily v. Parker*, 152 F. 2d 174, 162 A. L. R. 819 (C. C. A. 7th 1945): "Plaintiffs are the four minor children of Mrs. Olive Means Daily and Wilfred J. Daily. They bring this action through their mother as next Friend, against the defendant, Mrs. Marian Parker, who, they allege, enticed their father from his and their home and to go to Chicago where he lives with defendant, a married woman, and they further allege that their father fails and refuses to maintain or support them or their home. All of this conduct or misconduct on their father's part is allegedly due to defendant's successful efforts in using her feminine charms, to entice and lure said father from his home that he might live and cohabit with defendant in Chicago." The District Court dismissed the complaint. "Our conclusion. . . is that a child to-day has a right enforceable in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrong-doing third party."²

(2) *Bowen v. Mewborn*, 218 N. C. 423, 11 S. E. 2d 372 (1940): The complaint alleged (1) that on the night of May

² This decision is commented upon in 59 Harv. L. Rev. 297 (1945) and Note, 162 A.L.R. 824 (1946). Compare with it *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C.D.C. 1946).

10, 1939, defendant, Marvin Mewborn, then under the age of sixteen years, invited plaintiff to go riding with him in an automobile owned by his father, the defendant, George Mewborn, and driven by Marvin with his father's consent, and plaintiff accepted the invitation; (2) that the defendant, Marvin Mewborn, drove the automobile along a country road and thereafter by word and deed demanded that the plaintiff have sexual intercourse with him; (3) that the plaintiff resisted the advances of the defendant, Marvin Mewborn, and begged him to desist, but he stated that he intended to have sexual intercourse with her, that his father, the defendant, George Mewborn, had told him to do such things, and that he then and there forcibly assaulted and attempted to ravish her to her great hurt, alarm and humiliation; and (4) that prior to May 10, 1939, as plaintiff is informed and believes, the defendant, George Mewborn, had frequently advised the defendant, Marvin Mewborn, to engage in illicit sexual intercourse. The defendant, George Mewborn, demurred to the complaint on the ground that, as to him, it failed to state facts sufficient to constitute a cause of action. The trial court overruled the demurrer. *Reversed*. "We cannot say that defendant George Mewborn, by the immoral advice given his son, could have reasonably foreseen, or expected as the natural and probable consequences, that his son would commit a crime and assault on plaintiff. We cannot hold him on this record for such unnatural and vicious advice. It is not alleged that the defendant George Mewborn participated in the act complained of by the plaintiff, nor do we think it can be said that he aided and abetted, counseled, advised or encouraged his son in doing the act alleged, that is, committing an assault on plaintiff. The complaint fails to allege that the defendant George Mewborn counseled or advised or encouraged his son to commit an assault on anyone. Nowhere does it allege that this counsel and advice is related to this act, and without connecting the time at which the advice was given to the act itself, we think that it was too remote. It may have been years prior to the act complained of. Where an individual counsels the commission of an act which may be committed either lawfully or unlawfully, it must be presumed that the counsel intended only the lawful act; such counsel and advice standing alone, is insufficient to make the adviser a party responsible legally for the unlawful act following it. The complaint of this serious charge against the father is taken as true for the purpose of this demurrer, if he had answered the complaint, it may have been another story."³

³ For other recent cases in which the question was whether or not the facts stated were sufficient to constitute a cause of action, see *Taylor v. Continental Casualty Co.*, 75 Ohio App. 299, 61 N.E.2d 919 (1945); *Holland v. Good Bros.*, 318 Mass. 300, 61 N.E.2d 544 (1945); *Nelson v. Melvin*, 236 Iowa 604, 19 N.W.2d 685 (1945); *McLeod v. Southern Railway Co.*, 188 S.C. 14, 198 S.E. 425 (1938); *General American Life Insurance Co. v. Stadium*, 223 N.C. 49, 25 S.E.2d 202 (1943); *Truax v. Ellett*, 234 Iowa 1217, 15 N.W.2d 361 (1944); *Haddock v. Florida Motor Lines Corporation*, 150 Fla. 848, 9 So. 2d 98 (1942); *Kantor v. Kessler*, 132 N.J.L. 336, 40 A.2d 607 (1945); *Soffos v. Eaton*, 152 F.2d 682 (App. D. C. 1945); *Grant v. Reader's Digest Association*, 151 F.2d 733 (C.C.A. 2d 1945); *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P.2d 773; *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941).

(3) *Cabell v. Cottage Grove*, 170 Or. 256, 130 P. 2d 1013 (1942): Declaratory judgment proceeding in which the State Highway Commission sought a judicial determination that it was authorized "in the construction, maintenance and operation of a state highway, within the limits of an incorporated city," to construct barriers at the edge of the highway so as to shut off access to the highway from the city streets which it intersected. Defendants, the City and certain owners of property therein, demurred to the complaint for insufficiency of the facts stated and want of jurisdiction. The trial judge sustained the demurrers on the ground that the Commission did not have authority to construct such barriers. Although the Supreme Court was of the opinion that he rightly decided the question of authority, it *reversed* the decree which he rendered for defendants. (i) The complaint alleges a justiciable controversy and, hence, the court had jurisdiction. (ii) For the same reason, "the complaint states facts sufficient to constitute a cause of suit under the declaratory judgment law. . . . The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all. Even though the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled by the court under the Declaratory Judgment Law, he has stated a cause of suit." (iii) Consequently, "the demurrers should have been overruled, and, after the filing of an answer which presumably would have admitted the existence of the controversy alleged, a decree containing a declaration of rights should have been entered."⁴

PENTON v. CANNING

Supreme Court of Wyoming, 1941. 57 Wyo. 390, 118 P.2d 1002.

RINER, CHIEF JUSTICE. [This was an action for the malicious prosecution of plaintiff by defendant for the theft of a heifer calf. Plaintiff's amended petition alleged in substance that "without probable cause therefor" defendant maliciously made complaint to a Justice of the Peace that plaintiff had stolen the calf from defendant; that plaintiff pleaded not guilty to the charge but that upon the preliminary hearing the Justice of the Peace, "in utter disregard of the testimony of the parties and witnesses" and without sufficient evidence, "found that a crime had been committed and that there was probable cause to believe the defendant guilty of the offense," and ordered plaintiff to appear at the next term of the District Court to answer the complaint; that thereafter defendant brought an action of replevin against plaintiff before another Justice of the Peace to recover

⁴ *Accord*: *Maguire v. Hibernia Savings & Loan Society*, 23 Cal. 2d 719, 146 P.2d 673 (1944). *Cf.* *Armstrong v. Carman*, 108 Colo. 223, 229-230, 115 P.2d 386 (1941).

possession of the calf and that after a trial of that action the Justice of the Peace rendered judgment for plaintiff which was affirmed on appeal to the District Court; and that for that reason the criminal proceeding against plaintiff was thereafter dismissed on motion of the Prosecuting Attorney.

[Defendant demurred to the petition on the ground that it failed to state facts sufficient to constitute a cause of action, but her demurrer was overruled. She then answered, denying the allegations of the petition, and, after a trial, judgment for \$1,000 was rendered in plaintiff's favor, from which defendant appealed, assigning, among other errors, the overruling of her demurrer.]

The attitude of the courts and authorities generally toward the action of malicious prosecution has been well stated by Mr. Newell in his text dealing with that subject. The author says in section 13, at page 21: "Actions for malicious prosecutions are regarded by the law with jealousy. Lord Holt said more than two hundred years ago that they 'ought not to be favored but managed with great caution'. Their tendency is to discourage prosecution for crime, as they expose the prosecutors to civil suits, and the love of justice may not always be strong enough to induce individuals to commence prosecutions, when, if they fail, they may be subjected to the expense of litigation, if they be not mulcted in damages."

And in section 14 following, in similar vein the text states: "Suits by which the complainant in a criminal prosecution is made liable to an action for damages, at the suit of the person complained of, are not to be favored in law, as they have a tendency to deter men who know of breaches of the law from prosecuting offenders, thereby endangering the order and peace of the community."

Additionally, in the course of section 15, page 22, the author further remarks concerning the action that, "it should be carefully guarded and its true principles strictly adhered to, that it may not, on the one hand, impede the free course of public justice, nor, on the other, suffer malicious and causeless prosecutions to escape its grasp. While the court should not discourage actions for malicious prosecutions by establishing harsh rules of evidence, or by the rigid principles of law, by force of which a party may be deprived of an important remedy for a real injury, at the same time, all proper guard and protection should be thrown around those who, in obedience to the mandates of duty, may be compelled to originate and carry on a criminal prosecu-

tion which may from any cause terminate in favor of the accused." ¹ . . .

Under the authorities cited above the action, not being a favored one, should require at the very least a careful examination of the pleadings and proofs appearing in the case. At the very least also these matters, i. e., pleadings and proof, should be consistent with sound logic and elementary principles.

An inspection of the allegations of plaintiff's pleading quoted above discloses that he has set forth the fact that the result of the preliminary examination before the Justice of the Peace Dobler was unfavorable to the plaintiff in this, the malicious prosecution action, on account of the action of the Justice of the Peace in binding plaintiff over to respond in the District Court to the charge of theft of the calf in question. To avoid the effect of this allegation plaintiff states, as we have seen, that the officer acted "in utter disregard of the testimony of the parties and witnesses and wholly without any adequate, sufficient or competent evidence upon which to base any judgment or find against the plaintiff".

In *Johnson v. Harrison*, 177 Ind. 240, 97 N. E. 930, 933, 39 L. R. A., N. S., 1207, a familiar rule of pleading is stated thus: "And where a plaintiff states in his complaint, together with facts constituting a cause of action, other material and relevant facts which are a defense to the cause of action, and does not allege facts avoiding such defense, his complaint will not withstand a demurrer." (Citing authorities.) See, also, 49 C. J. 151 and cases cited in note 38; 21 R. C. L. 492, § 55. It is likewise an elemental rule governing pleadings, generally speaking, that the failure of the initial pleading to state a cause of action may be raised at any time. 49 C. J. 820, § 1216 and cases cited; *Grover Irrigation & Land Co. v. Lovella Ditch, etc., Co.*, 21 Wyo. 204, 234, 235, 131 P. 43, L. R. A. 1916C, 1275, Ann. Cas. 1915D, 1207.

This court has heretofore in *McIntosh et al. v. Wales*, 21 Wyo. 397, 134 P. 274, 276, Ann. Cas. 1916C, 273, pointed out that: "The essential elements necessary to be shown by the petition and evidence in an action for malicious prosecution are (1) the institution of the proceedings; (2) without probable cause; (3) with malice; (4) that the proceedings have terminated and in plaintiff's favor; (5) damage to plaintiff."

The question then presents itself whether the allegations quoted above are in this case affected by these rules. A careful examination of the authorities we have been able to find would indicate that an affirmative answer be given to this query. The

¹ Quotations from other authorities to the same effect are omitted.

following brief review of the language of well known texts and the decisions of leading appellate courts will supply the grounds for such a conclusion.

In 38 C. J. 464, § 127, the text considering a situation "where the declaration or complaint alleges facts which are prima facie evidence of grounds for instituting the original proceedings" on which the malicious prosecution action is based, i. e., where the pleading sets out facts disclosing prima facie probable cause for such proceedings, "in these circumstances it is held that an allegation of facts to rebut the inference of probable cause is necessary".

The same text discussing the effect of a result unfavorable to plaintiff appearing in a malicious prosecution action, where there is a preliminary examination by a magistrate, for the purpose of determining whether the plaintiff aforesaid shall respond to the charge against him in a higher tribunal (38 C. J. 411, § 45), says that: "While there is some authority to the contrary, it has been generally held that, where the result of the preliminary examination before a magistrate is unfavorable to accused and he is held or committed by the magistrate, this is prima facie but not conclusive evidence of probable cause. This prima facie case may be overcome by evidence that the action of the magistrate was obtained by false testimony or other improper means; but unless it is overthrown by testimony of that character, it becomes conclusive and must prevent plaintiff from prevailing."² . . .

It is urged for the plaintiff and respondent, Penton, that there is "a clear distinction which is made in the authorities between cases in which the committing magistrate has jurisdiction to and does finally, try, determine and convict the defendant and cases in which he sits merely as a committing magistrate", and the rule announced in *Ross v. Hixon*,³ supra, is insisted upon as the correct rule to govern the case at bar.

So far as the *Ross v. Hixon* case is concerned, it is, we think, sufficient to say that in *Giusti v. Del Papa*,⁴ supra, the Supreme Court of Rhode Island pointedly criticises the position taken in the *Hixon* case, saying: "With all due deference, we feel constrained, for the reasons that we have given, to dissent from this conclusion. We do not think that it follows that, because the binding over is only prima facie evidence of probable cause, it is not necessary to attack it in the petition for fraud or

² Quotations from and discussion of other authorities to the same effect are omitted.

³ 46 Kan. 550, 26 P. 955, 12 L.R.A. 760, 26 Am. St. Rep. 123.

⁴ 19 R.I. 338, 33 A. 525.

undue means; or, in other words, to aver such fraud or undue means to negative its effect. The pleader must state a cause of action, and he fails to do so unless he overthrows the prima facie effect of probable cause arising from the binding over." . . .

Relative to there being any "clear distinction" so far as it affects the matter of properly alleging the element of probable cause in a malicious prosecution action, as plaintiff urges and above recited, we are unable to see that that is so.

Viewing in their entirety the authorities examined, as above set forth, we are obliged to conclude that the amended petition in the case at bar quite fails to measure up to the standard set by them and accordingly fails to state a cause of action. As we have seen, that pleading avers that the Justice of the Peace Dobler, found that "a crime had been committed and that there was probably cause to believe the defendant guilty of the offense" and ordered the plaintiff to be bound over to answer the charge in the district court of Fremont County. This was an allegation of prima facie probable cause for instituting the prosecution.

In order to avoid the effect of this statement, the pleading alleges merely that the action of the Justice was taken "in utter disregard of the testimony of the parties and witnesses and wholly without any adequate, sufficient or competent evidence upon which to base any judgment or finding against the plaintiff". Surveyed in the light of the foregoing authorities, this is not such an allegation as will avoid a prima facie averment of probable cause made as aforesaid.

It must not be overlooked that the case at bar is an asserted malicious prosecution of the plaintiff, Penton, by the appellant and defendant, Mrs. Gertrude C. Boyd Canning, and by no one else. What connection did this woman have with the conduct of the officer in acting as he did? According to plaintiff's pleading, absolutely none. On the contrary, that pleading expressly asserts that the Justice disregarded her testimony, as well as that of Penton, and the testimony of all the witnesses given on the preliminary hearing. That is all. The pleading would even appear to attack the testimony of plaintiff himself by its allegation that the officer acted "without any adequate, sufficient or competent evidence". However, this is but the pleading of a legal conclusion. Is Mrs. Canning to be held responsible for the error of the official when neither plaintiff's pleading nor his proofs aver or establish that she was? We hardly think that can be the law. Otherwise she could have told the Justice of the Peace in her testimony given on the preliminary hearing—and what she said we do not know—that she was in good faith in error concerning the charge made against Penton, and be-

cause the Justice wrongfully disregarded her testimony, she should nevertheless be held responsible for his action in finding that there was probable cause to believe the defendant, Penton, guilty of the offense charged. This can hardly be so. There is nothing alleged or proven to impeach the independent action of the Justice of the Peace in the matter with which Mrs. Canning was concerned, according to the allegations of plaintiff's pleading. She employed no fraud or other improper means to influence the officer's conduct.

Without further extending this opinion, we feel obliged to direct that the judgment of the district court of Fremont County should be reversed for proceedings not inconsistent with the views hereinabove expressed.

Reversed.⁵

NOTE

Jacobson v. Mutual Benefit Health & Accident Association, 73 N. D. 108, 117-118, 11 N. W. 2d 442 (1943): "[P]laintiff urges that the defense of res judicata can not be raised by demurrer. Ordinarily, res judicata is a defense to be raised by answer. But conditions arise where such rule is not applicable. That the complaint fails to state facts sufficient to constitute a cause of action is one of the statutory grounds for demurrer. . . . The 'failure to state facts' is measured by the allegations of the complaint. The 'facts' stated comprise the whole body of facts set forth. The failure to state a cause of action is not confined to mere omission, but may be demonstrated by affirmative statements in the complaint. If the pleader sets forth facts that show affirmatively he has no cause of action, then the complaint fails to state a cause of action. . . . Hallock v. Dillon et al., 75 Misc. 292, 132 N. Y. S. 796, states the rule succinctly as follows: 'A complaint, which sets forth facts constituting a cause of action and facts constituting a valid defense, must be considered as a whole and is bad on demurrer.'"

PROBLEM

What was the obstacle which the plaintiff had to overcome in each of the next two cases in order to state a cause of action, and how did the plaintiff in each case attempt to surmount it?

THIBAULT v. LALUMIERE

Supreme Judicial Court of Massachusetts, 1945.
318 Mass. 72, 60 N.E.2d 349.

RONAN, JUSTICE. This is an appeal from an order sustaining the defendant's demurrer to the plaintiff's declaration filed in an action of tort which was commenced on July 16, 1943. Although the declaration contains a mass of irrelevant and immaterial

⁵ Dissenting opinion of Blume, J., omitted.

matters, no objection to its form was made in the Superior Court. We set forth all the allegations pertinent to any possible cause of action upon which the pleader might have intended to base a claim against the defendant. The declaration alleged that from the time she entered the employ of the defendant's firm in January, 1930, until 1943, when she finally ceased to keep company with the defendant, he planned to seduce her; that he induced her to keep company with him and to become engaged to marry him by his false representations that he loved her and that he was a single man; that she discovered in May, 1930, that he was married and left her employment; that she re-entered the employment several times upon his promise not to molest her but that she quit on a number of occasions when he molested her; that in 1934 she left the Commonwealth; that upon her return in 1942 the defendant represented that he had secured a divorce, that he was a single man and would marry her, and that he would make a permanent home for her; that relying on these representations she went to live at the home of the defendant's mother where he lived; that she became dissatisfied with his delaying the marriage and left the said home; and that she learned in June, 1943, that he had married again in 1942 and she ceased to associate with him any longer. She alleges that as a result of the defendant's conduct she submitted to his embraces and caresses, was deprived of an opportunity to meet and marry some honorable young man, lost employment, suffered humiliation and grief, and was made ill.

The declaration sets forth no cause of action for seduction. Nothing more than an intent or a plan to seduce her is alleged. We do not intimate that, if seduction had been averred, she could recover damages. It has been held that, in order that a father may recover for the seduction of his minor daughter or a master for the seduction of a female servant, it must be shown that he lost the services of the woman on account of the seduction. The action cannot be maintained on any other basis. *Dennis v. Clark*, 2 Cush. 347, 349, 48 Am. Dec. 671; *Kennedy v. Shea*, 110 Mass. 147, 150, 14 Am. Rep. 584; *Cook v. Bartlett*, 179 Mass. 576, 579, 580, 61 N. E. 266. But it is an ancient and settled rule of the common law that the party seduced is barred by her participation in a wrong from recovering damages. *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Hamilton v. Lomax*, 26 Barb., N. Y., 615; *Wrynn v. Downey*, 27 R. I. 454, 63 A. 401, 4 L. R. A., N.S., 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912; *Salchert v. Reinig*, 135 Wis. 194, 115 N. W. 132.¹ While damages for seduction may not be

¹ But see *Johnson v. Harris*, 187 Okl. 239, 240, 102 P.2d 940 (1940): "It is true that this was the rule at common law [that an action for seduction cannot be

recovered in an independent action, they may be included in the measure of damages in an action for breach of promise of marriage. *Sherman v. Rawson*, 102 Mass. 395; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336. The plaintiff, however, cannot recover damages for seduction as an incident to an action for breach of promise of marriage if, as will presently appear, she cannot maintain such an action.

The plaintiff contends that she can recover on this declaration for an assault and battery. This contention rests upon the allegation that "as a result of defendant's behavior the plaintiff was caused to acquiesce in and submit to defendant's embraces and caresses." It is to be noted that this allegation refers to an element of damage and does not purport to set forth a substantive cause of action. In the next place, if the plaintiff knowingly consented to and participated in these manifestations of apparent affection by the defendant, her consent would bar her from complaining that conduct of this character constituted a wrong to her. *Fitzgerald v. Cavin*, 110 Mass. 153; *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; *Bates v. Reynolds*, 195 Mass. 549, 81 N. E. 260; *Szadiwicz v. Cantor*, 257 Mass. 518, 154 N. E. 251, 49 A. L. R. 958. If, as she now contends, her consent was procured by fraud of the defendant in that he did not intend to perform his promise to marry her, *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N. E. 609, 62 A. L. R. 525, she could not maintain an action on account of such acts committed during a courtship where the only ground for contending that such acts constituted a wrong was his intent not to carry out his promise to marry her and so was directly attributable to the breach of contract to marry if, as will appear, a statute declares that the breach of such a contract shall not be deemed to be a legal wrong or injury.

The final contention of the plaintiff is that an action of tort for deceit is alleged in the declaration. It is hard to see how the plaintiff was deceived by any representations of the defendant, at least in the early years of their association, when it is specifically alleged that she knew in May, 1930, within five months of their acquaintance, that he was married and that their association, although alleged thereafter to be somewhat interrupted, continued

maintained by the seduced female], but seduction was not a criminal offense at common law. 24 R.C.L. 738, 761. In this state seduction under promise of marriage is made a crime by [statute, and another statute] gives a cause of action to any person who suffers detriment as the result of the 'unlawful act or omission of another.' The commission of a crime is an unlawful act within the meaning of this section, and we are of the opinion that under these sections a cause of action accrues to the seduced female."

For a collection of cases, see Note, 121 A.L.R. 1487 (1939).

until 1934 when she left the Commonwealth. *Des Brisay v. Foss*, 264 Mass. 102, 111, 162 N. E. 4; *Franklin A. Snow & Co. v. Commonwealth*, 303 Mass. 511, 516, 22 N. E. 2d 599. When she returned to the Commonwealth in 1942, the defendant, it is alleged, again promised to marry her and she accepted the promise but he again neglected to marry her. One who has been induced by fraud to enter into a contract usually has the choice of rescinding the contract or of affirming the contract and suing in tort for damages. The plaintiff in attempting to maintain an action for deceit has chosen to affirm the contract to marry. *Goodwin v. Dick*, 220 Mass. 556, 107 N. E. 925; *Forman v. Hamilburg*, 300 Mass. 138, 14 N. E. 2d 137.

However the plaintiff's contentions are viewed, they all stem from the alleged contract to marry which she alleged was made between the defendant and herself, *Brick v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, 11 N. E. 2d 902, 114 A. L. R. 521. All the damages alleged by her were caused by his breach of that contract. General Laws (Ter. Ed.) c. 207, § 47A, inserted by St. 1938, c. 350, § 1, provides that a "Breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor." This statute changed the public policy of this Commonwealth. It not only abolished the right of action for breach of promise but it went farther and abolished any right of action, whatever its form, that was based upon such a breach. The breach is no longer a legal wrong. Similar statutes adopted in other jurisdictions have been broadly construed. "It is a well-recognized rule that the adjudged construction of a statute by a foreign state or country, where it was enacted, is to be given to it, when it is afterwards passed by the legislature of another state or country." *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 227, 5 N. E. 307, 309, 55 Am. Rep. 465; *In re McNicol*, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306; *Commissioner of Banks v. Prudential Trust Co.*, 242 Mass. 78, 84, 136 N. E. 410; *Commissioner of Banks v. McKnight*, 281 Mass. 467, 470, 183 N. E. 720. Actions in tort for fraud have been held to be within the prohibition of such statutes and any other cause of action that originates in the breach of a promise of marriage. The plaintiff's cause of action arises out of a breach of promise of marriage, and she cannot circumvent the statute by bringing an action in tort for damages so long as the direct or underlying cause of her injury is the breach of promise of marriage. *A. B. v. C. D.*, D. C., 36 F. Supp. 85; *Fahy v. Lloyd*, D. C., 57 F. Supp. 156; *Young v. Young*, 236 Ala. 627, 184 So. 187; *Pennington v. Stewart*, 212 Ind. 553, 10 N. E. 2d 619; *Bean v. McFarland*, 280 Mich. 19, 273 N. W. 332; *Bunten v.*

Bunten, 192 A. 727, 15 N. J. Misc. 532; Fearon v. Treanor, 272 N. Y. 268, 5 N. E. 2d 815, 109 A. L. R. 1229; Hanfgarn v. Mark, 274 N. Y. 22, 8 N. E. 2d 47; Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N. Y. S. 2d 97.

Demurrer sustained.

Judgment for the defendant.

BUSKEY v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

Supreme Court of New Hampshire, 1941. 91 N.H. 522, 23 A.2d 367.

Case to recover damages for negligently failing to provide telephone service, as the result of which, it is alleged, the plaintiff's barn and chattels therein were destroyed by fire. The defendant demurred to the plaintiff's declaration. This demurrer was sustained by Young, J., and the plaintiff excepted. The allegations of the plaintiff's declaration are more fully set forth in the opinion.

BRANCH, Justice. The case of Barrett v. New England Telephone & Telegraph Company, 80 N. H. 354, 117 A. 264, 23 A. L. R. 947,¹ undoubtedly furnished the basis for the ruling of the trial court, and the plaintiff in his brief and oral argument indicates his perception of the fact that this case must be overruled or distinguished before he can succeed. No good reason for overruling that decision has been suggested and it is reaffirmed. The present case, therefore, presents only the question whether the plaintiff's declaration contains allegations to which the decision in the Barrett case has no application.

The first count in the plaintiff's declaration contains a simple allegation that the defendant "did carelessly, negligently and unlawfully fail to provide the plaintiff with telephone ser-

¹ This was an action on the case. Plaintiff alleged that he subscribed to telephone service and that defendant installed an instrument in his residence; that on the morning of a certain day service was interrupted without his fault; that defendant had notice of such interruption early in the day but negligently failed to restore the service; that in the evening of that day plaintiff's buildings accidentally took fire; that because of the interruption of telephone service plaintiff was unable to summon the fire department and his buildings were destroyed by fire; and that the greater part of them would have been saved but for the interruption of the telephone service. Plaintiff was non-suited at the close of his evidence and his exception was *overruled* on appeal. "If the suit were between private parties, an action sounding in tort could not be maintained. It is not now necessary to go further than to hold that the fact that the defendant is engaged in the public service, does not make its mere failure to perform its duty to serve a wrong different in character from what it would be in the case of a private agreement. . . . The evidence in this case shows a typical instance of a contract for the usual and ordinary service, with no knowledge or notice of any emergency. The only wrong complained of is the negative one of failing to perform [the] service. . . . In such a case there is no recovery for the results of the unforeseen situation which thereafter arose."

vice." This count comes clearly within the scope of the decision in the Barrett case, and the defendant's demurrer thereto was properly sustained.

The distinguishing feature of the second count is the allegation that "the defendant, its agents or servants, did carelessly, negligently and unlawfully sever, cut off, and disconnect all telephone connection and communication between the residence of the plaintiff and the central operating station of said defendant." This is an allegation that the plaintiff's loss was caused by a misfeasance as distinguished from a mere nonfeasance on the part of the defendant. The plaintiff thus seeks to raise one of the questions which was not decided in the Barrett case. "Whether the application of the rule to cases of misfeasance, as distinguished from mere nonfeasance, as illustrated by the decided cases, can be sustained, is a question not involved in the present instance." *Barrett v. New England Telephone & Telegraph Company*, 80 N. H. 354, 360, 117 A. 264, 267, 23 A. L. R. 947. We do not think that the plaintiff's case is helped by the attempted distinction between misfeasance and nonfeasance. Whatever may have been its importance in former times when the law of negligence was in its infancy (see Bohlen: *The Basis of Affirmative Obligations in the Law of Torts*, 53 U. of P. Law Review, 209, reprinted in Bohlen: *Studies in the Law of Torts*, 33), in that law as here and now understood, the distinction is believed to be without significance as a test of liability. *Castonguay v. Acme Knitting Machine & Needle Company*, 83 N. H. 1, 6, 136 A. 702. The principles laid down in the Barrett case are decisive of the second count and the demurrer thereto was properly sustained.

The plaintiff's third count contains an allegation that the defendant "negligently and unlawfully failed to give the plaintiff notice of said disconnection of telephone connection and communication between his said residence and said central operating station of said defendant." Here again the plaintiff seeks to bring his case within an exception stated in the Barrett case, as follows: "It is not a case where the defendant's negligent performance of its contract misled or otherwise injured the plaintiff. It is not a case where the plaintiff did or omitted to do any act relying upon the defendant's obligation, or upon the performance thereof. Whether in such cases, or in any of them, there might be a pure tort liability, so that the broader rule of accountability for damage would apply, is a question which is not involved in this case and upon which no opinion is expressed."

More fully stated, the third count alleges that the defendant negligently severed the telephone connection between the plain-

tiff's house and its central operating station and negligently failed to give plaintiff notice of such disconnection, that as a result, the plaintiff was delayed in notifying the fire department of the outbreak of a fire and his property was thereby destroyed.

The defendant clearly contracted with the plaintiff to furnish him with the usual telephone service. It may be conceded that this contract involved a duty like that recognized in *Douglas v. United States Fidelity & Guaranty Company*, 81 N. H. 371, 127 A. 708, 37 A. L. R. 1477, to use due care in doing what its contract bound it to do. "That obligation is ordinarily imposed by law upon all who undertake a service." *Douglas v. United States Fidelity & Guaranty Company*, *supra*, 81 N. H. 375, 127 A. 711, 37 A. L. R. 1477. The obligation to use due care thus became an implied term of the contract between the parties. *Deming v. Grand Trunk Railroad Co.*, 48 N. H. 455, 465, 2 Am. Rep. 267; *Hutt v. Hickey*, 67 N. H. 411, 416, 29 A. 456. ". . . the promise might have been stated as a promise by the defendant to do his duty in that behalf." *Parke, J., in Streeter v. Horlock*, 1 Bing. 34, quoted in *Deming v. Grand Trunk Railroad Co.*, *supra*. If it be assumed that due care required that notice of the approaching interruption of service be given to the plaintiff, and if the lack of notice caused an otherwise preventable loss of the plaintiff's property, there is no disguising the fact that the plaintiff thus seeks to recover special damages growing out of a breach of contract by the defendant. The *Barrett* case decided that this cannot be done.

This conclusion is not inconsistent in effect with the case of *Carr v. Maine Cent. Railroad*, 78 N. H. 502, 102 A. 532, L. R. A. 1918E, 389, on which the plaintiff relies. The plaintiff was there permitted to recover damages which must have been within the contemplation of the parties as the only possible result of the defendant's failure to procure the consent of the commission to the allowance of the plaintiff's claim. In other words that was a case where the contract rule of damages which was applied in the *Barrett* case permitted a recovery. The same is true of the case of *Douglas v. United States Fidelity & Guaranty Company*, *supra*. The statement in the *Carr* case that "their declaration sounds in tort" may be disregarded as erroneous and unnecessary to the decision of that case. The above-quoted statement was made as an answer to the contention of the defendant that there was no consideration to support its agreement to procure the consent of the commission. The consideration for the defendant's undertaking was obviously the plaintiff's forbearance of such action as he might have taken to enforce his claim. The result of the *Carr* case is clearly right.

It follows that the defendant's demurrer to all counts of the plaintiff's declaration was properly sustained, and the order, therefore, is, exceptions overruled.²

SECTION 3. MATERIAL AND IMMATERIAL PROPOSITIONS

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1241-1244, 1251-1252.

Since we are concerned with the process of pleading as preliminary to the process of proof,¹ we are primarily interested in pleading as a device for the formation of issues of fact, and in their nature. They must be distinguished from but seen in relation to issues of law. By an issue we mean, in either case, an opposition between the parties to litigation.² The opposition must be of such a sort that its resolution either leads to the legal consequences which one party seeks, or avoids the legal action which the other party wishes to avert.

The way in which rules of substantive law determine in part the formulation of issues of fact and of law is easily seen if these rules are viewed as statements of the specific factual conditions upon which specific legal consequences depend. As rules they prescribe that official action follow upon the satisfaction of the conditions specified. Rules of substantive law are conditional imperatives, having the form: If such and such *and* so and so, etc. is the case, *and unless* such and such *or unless* so and so, etc. is the case, *then* the defendant is liable or guilty in the respect charged, and must be dealt with appropriately. Thus formulated, rules of substantive law at once conditionally prescribe official action of some sort and state the conditions of litigation.³ It should be noted that a rule of law, either in its imperative or

² For a collection of cases, see Note, 23 A.L.R. 952 (1923), and for a discussion of the question involved in the principal case see Prosser, Torts, 201 ff (1941).

¹ We do not mean that written pleadings are essential or that in time the formation of issues precedes the trial, but that logically issues must be formed prior to proof, since every proof requires that the proposition to be proved be stated as its objective. [This and all other footnotes are the authors' but they have been re-numbered.]

² There may, of course, be many parties but for the purposes of analysis we are taking as typical the simplest case in which there is a single plaintiff and a single defendant. The reader is advised that throughout this analysis of pleading we shall deal only with the typical case and ignore the many variations upon and exceptions to it. He must remember that we are not attempting to describe the way in which the process of pleading actually occurs; we wish only to define the nature of issues of fact.

³ By the phrases "official action," or "legal action" or "legal consequences," we mean at least a judgment of the trial court; more than this may be involved, of course, but for our purposes it is not necessary to consider the other consequences which may or may not ensue upon the judgment of the trial court.

its declarative construction, is a general statement. It applies to all particular instances of *such and such* and *so and so*. The factual conditions, which are stated in the antecedent clauses of the rule, introduced respectively by *if* and *unless*, are not singular or unique facts, but kinds of facts of which there can be an indefinite number of singular instances. This will become clearer subsequently. It is at once apparent that the parties to litigation, seeking legal action or its avoidance, can proceed in a number of different ways, which can be indicated by the questions to which they may give opposed answers.

(1) Does the specific legal action desired follow upon the specific factual conditions stated? This is a question of law. If the parties answer this question affirmatively and negatively, an issue of law is formed which is constituted by the affirmation and denial of the particular rule.⁴ If the judge affirms the rule, invoked by the plaintiff, in a case in which a legal issue is the only one, the legal consequences sought by the plaintiff necessarily follow; if the judge denies the rule, the defendant succeeds in avoiding them.⁵

(2) Do particular instances of the factual conditions, upon which the desired legal action depends, exist? This is a question of fact. An issue of fact is formed if the plaintiff alleges and the defendant traverses one or more of the propositions which state particular instances of the factual conditions upon which the desired legal consequences depend. When the plaintiff alleges one or more propositions which state particular instances of factual conditions introduced by *if*, he does not have to traverse propositions which state particular instances of factual conditions introduced by *unless*; he may subsequently traverse these latter propositions if they are alleged by the defendant as affirmative defenses. If in a case in which an issue of fact is the only one, the jury's verdict affirms the propositions alleged by the plaintiff, the legal consequences sought by the

⁴ In the usual case, it will be the plaintiff who affirms and the defendant who denies the rule, although demurrers to so-called affirmative defenses and to counterclaims are by no means uncommon. Of course, we recognize that the plaintiff may in some cases invoke a number of rules from which the same or different legal consequences follow, but throughout this discussion we shall deal with the simplest case, that is, the invocation by the plaintiff of a single rule.

⁵ Of course, we realize that the trial judge's decision is final only if there is no appeal and that it may be reversed on appeal. Moreover, the trial judge or the court on appeal, as the case may be, may and usually will permit the defendant to answer the plaintiff's complaint, if the rule invoked by the plaintiff is affirmed, and the plaintiff to amend his complaint, if the rule invoked by him is denied. If the plaintiff amends, he must invoke another rule of law and another issue of law may be formed; if the defendant pleads over, a question of fact is raised, as we are about to show; and in either event the controversy will not have been ended by the resolution of the original issue of law.

plaintiff necessarily follow; otherwise, the defendant again succeeds in avoiding that legal action.⁶

(3) These two radically different types of opposition can occur in the same case. Thus to the composite question, Do particular instances of these factual conditions exist and are these factual conditions the sort from which the desired legal consequences follow?, the plaintiff may give two affirmative and the defendant two negative answers. The plaintiff must affirm a rule of law if he makes allegations of fact; but the defendant may deny these allegations without denying the rule of law invoked by the plaintiff; he may, of course, do both, but need not. If both an issue of law and an issue of fact are raised by the pleadings, the former should on logical grounds be decided first, since if it is decided favorably to the defendant no trial of the issue of fact need be undertaken, whereas if it is decided adversely to the defendant, the issue of fact must be submitted to trial. An issue of substantive law can, of course, be raised at various points after the trial of an issue of fact is begun. Nevertheless, until a legal issue is raised and decided, the trial of an issue of fact must proceed *as if* the decision of the case rested upon its outcome, and this must mean that a rule of substantive law is for the time being assumed, that is, it is assumed that certain factual conditions support specific legal action.⁷

⁶ We realize that the jury's verdict may be set aside either by the trial judge or the court on appeal and that the statement in the text is literally accurate only in cases in which it is not so set aside. Perhaps we should say at this point that throughout this essay we are discussing the trial of an issue of fact as it occurs before a tribunal composed of judge and jury, that is, in a trial by jury of an action at law. However, a trial before a judge without a jury is governed by the same principles of logic and, in the main, by the same rules of procedural law as a trial by jury, so that we are analyzing what can be regarded as the typical case although it is the more complicated one. We shall use the word "tribunal" when we wish to refer to both judge and jury, or, indifferently, to either judge or jury. Whenever we wish to distinguish between them we shall refer to them separately. Whenever we use the word "judge" we shall mean the trial judge, and whenever we use the word "court" we shall mean an appellate court.

⁷ The temporal order of deciding issues of law and of fact is not always the logical order, although usually the issue of law is decided before the trial of the issue of fact is undertaken. This has not always been the normal procedure and is not now the invariable procedure. For one or another practical reason counsel may not raise the issue of law or the judge may not decide it, even if raised, until after the trial of the issue of fact is begun or, indeed, until after the jury have returned their verdict. However, the issue of law is of the same character whenever and however raised, whether during the stage of pleading by demurrer or motion to dismiss the complaint, or at the beginning or some later stage of the trial by motion to dismiss, or for judgment on the pleadings, or some other procedural device by which an issue of law can be raised; but the practical consequences of raising it at different times and in different ways may differ greatly. While the issue of law may not be raised during the stage of pleading, some one or more issues of fact must always be raised during that stage. However, that does not mean that one or more of the issues raised in that stage may not later be abandoned or that new issues of fact may not be injected into the controversy subsequently either as the result of an amendment of the pleadings or otherwise. Nor does it mean that the pleadings always reveal the precise issues of fact which will be submitted to trial.

(4) An issue of fact may be raised by an allegation on the part of the defendant which is traversed by the plaintiff. The rules of substantive law contain two groups of factual conditions, those introduced by *if* and those introduced by *unless*. Though the defendant does not traverse propositions of fact of the first sort which the plaintiff has alleged, or dispute the rule of law which the plaintiff has invoked, he may still avail himself of other factual conditions to avoid the threatened consequences. The rule includes the condition that the consequences follow unless so and so; that is, if so and so is the case, the consequences do not follow. If the defendant alleges the proposition of fact that a singular instance of so and so is the case, the plaintiff, to avoid being at a disadvantage, must traverse this proposition or must raise an issue of law. If the former, an issue of fact is formed in which the defendant alleges and the plaintiff traverses a given proposition.⁸ . . .

A rule of substantive law determines what propositions of fact are material in a case in which the rule is held to be tenable or is for the time being assumed to be tenable.⁹ The propositions of fact which the plaintiff alleges must stand in a certain relation to a tenable rule of law; they must report particular instances of the factual conditions therein enumerated and introduced by *if*. The propositions which the defendant alleges in affirmative defense must similarly report particular instances of the factual conditions introduced by *unless*. The factual terms of a rule of law are universal, by which it is meant that they refer to kinds of things, kinds of happenings, etc. They are symbolized by common names or by indefinite descriptive phrases. Such universal terms can be predicates in elementary propositions, the subjects of which are singular terms, symbolized by proper names or definite, uniquely designative, de-

⁸ The distinction between what we shall call negative and what we shall call affirmative defenses is thus indicated. The defendant interposes a negative defense when he joins issue by traversing one or more propositions of fact which the plaintiff has alleged. He interposes an affirmative defense when he himself alleges a proposition of fact which the plaintiff must traverse in order to form an issue of fact. The plaintiff can, however, raise an issue of law at this point by denying the rule of law which the defendant has invoked by his affirmative defense; thus the plaintiff can engage in an issue of law or in an issue of fact or in both. Moreover, instead of interposing a negative defense to the defendant's affirmative defense he may interpose an affirmative defense thereto, that is, in his reply to the defendant's affirmative defense he may allege a proposition of fact which the defendant must now traverse in order to raise an issue of fact. Since the plaintiff is often permitted to interpose both negative and affirmative defenses to the defendant's affirmative defense without formally replying thereto, since, in short, an answer containing an affirmative defense may be the last formal pleading, the formal pleadings do not always disclose the precise issues of fact to be tried.

⁹ We have stated the form of a rule of substantive law in the following manner: *If* such and such *and if* so and so is the case *and unless* such and such is the case *or unless* so and so is the case, *then* the defendant is guilty or liable with respect to a specific charge.

scriptions. It is thus clear how an elementary proposition of fact can report an instance of a kind of factual condition enumerated in a rule of law. One example will suffice. Suppose a rule of law to begin: "If a man break into the close of another. . . ." An elementary proposition which states "John Smith broke into my close" is a material proposition in a case in which the rule is tenable. It reports a particular instance of "breaking into a close" which is a kind of action done by a man, in this instance, the individual John Smith.

What we are here calling a material proposition is often referred to as a principal fact, an ultimate fact, an operative fact. Two confusions reside in this traditional use of language. In the first place, the distinction between a universal factual condition which is stated in a rule of law and the particular instance of that condition which is reported by an elementary proposition is not preserved; that it is lost is seen in the use of operative fact sometimes as a synonym for "fact category," meaning a kind of fact, and sometimes as a synonym for ultimate or principal fact in the sense of what is alleged or traversed. In the second place, the distinction between fact and proposition of fact is ignored. The principal or ultimate facts are said to be alleged and traversed in the pleadings. But, as we have seen, facts cannot be alleged, since to traverse a fact would mean to allege a contradictory fact, which is impossible.¹⁰ The difficulty here is partly a failure of analysis, the distinction between fact and proposition being subtle, and partly the persistence of a loose vocabulary. The difficulty is remedied by the recognition of the distinction between fact and proposition and by verbal usage unambiguously adapted to that end. We shall employ the phrase "operative fact" to refer to those facts which are reported by the propositions found by the jury's verdict to be true. The operative facts are therefore those upon whose existence legal consequences depend in a particular case. What are traditionally referred to as ultimate facts or operative facts in the sense of "fact categories" or factual conditions, we shall speak of as the factual terms of a rule of law, which are always universal terms. What are traditionally referred to as ultimate facts or operative facts in the sense of that which is

¹⁰ We have seen that a fact is not opposed by a contradictory fact but that contradictory propositions can be stated about any fact, one of which must be true and the other false, the true one reporting that which is the fact. When in traditional speech it is said that a contradictory fact is alleged, what must be meant, therefore, is that a contradictory proposition about that fact is alleged. Thus, if the plaintiff alleges "The document was signed yesterday," the defendant can oppose him by alleging the contradictory proposition "The document was not signed yesterday." He has not alleged a contradictory fact since, when the issue is resolved and it is known either that the document was or that the document was not signed yesterday, it is seen that there is only one fact.

capable of being disputed, we shall speak of as material propositions. A material proposition is thus always an elementary proposition, the predicate of which is a factual term in some rule of law.¹¹ Thus, the allegation of propositions as material necessarily invokes a rule of law. If the opponent contends that the propositions are immaterial, he is not traversing them, but raising an issue of law with respect to the rule invoked by the allegation of those propositions.

SYMINGTON v. HAXTON

Appellate Division of the Supreme Court of New York, First Department, 1921.
195 App. Div. 85, 186 N.Y.S. 397.

APPEAL by the defendant, A. Stroud Haxton, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of November, 1920, denying his motion to strike from the complaint an allegation with respect to his residence and citizenship.

LAUGHLIN, J.: This is an action to recover \$100,000 for a breach of warranty under a contract between the parties by which certain personal property was sold and delivered by the defendant to the plaintiffs for \$350,000.¹ In paragraph 1 of the complaint it is alleged that the plaintiffs were copartners and the only allegations in paragraph 2 of the complaint are that the defendant was and still is a British subject and a non-resident of the State of New York. The defendant moved to strike out paragraph 2 and the motion was denied on the ground that all of the allegations of the paragraph are immaterial and that, therefore, the defendant is under no obligation either to admit or deny them and on that theory is not prejudiced. This we regard as bad practice. Doubtless the learned court was right in expressing an opinion that the defendant is not obliged to answer these allegations²; but he is entitled to have such immaterial allegations stricken out and should not be subjected to the risk of determining at his peril whether or not they may be deemed material or immaterial by the trial court and if deemed material not denied or whether or not he may be prejudiced thereby.³ Moreover, it is perfectly plain that these al-

¹¹ General propositions are never material.

¹ Try to formulate the rule of substantive law which regulates a controversy of this sort.

² N. Y. Civ. Prac. Act § 243: "Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply where a reply is required, must be taken as true for the purposes of the action. . . ."

³ Cf. *Murphy v. National City Bank of New York*, 203 App. Div. 571, 574, 196 N.Y.S. 859 (1st Dep't 1922): "Such allegations in a complaint are much

legations, which are set forth not inadvertently but in a special paragraph were inserted in the complaint for an ulterior purpose and in the hope that the plaintiffs may obtain some undue benefit or advantage thereby through possible prejudice or bias on the part of one or more jurors. Since the pleadings are before the court without being formally offered in evidence, it is manifest that the defendant might be prejudiced by permitting such allegations to remain in the pleadings for they might be referred to by counsel during the trial or in some manner be brought to the attention of the jury. They have no bearing on the issues in the case and are wholly immaterial thereto and should, therefore, have been stricken out. (Howard v. Breitung, 172 App. Div. 749, 159 N. Y. S. 115; Bulova v. Barnett, Inc., 193 id. 161, 183 N. Y. S. 495.) It was no more proper to incorporate them in the complaint than to have specified the defendant's religion or lack of religion or to have incorporated any other allegations calculated and intended to give plaintiffs undue benefit or advantage, not on the merits of their case, but through a possible prejudice that might be aroused by such allegations. In Zobel Company v. Canals (188 App. Div. 231, 176 N. Y. S. 537) we reversed a judgment on the ground that a question was asked with respect to the citizenship of a material witness for a party calculated and intended to convey the impression that the witness was a citizen of a country with which our country was at war. The order should, therefore, be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Motion to dismiss appeal denied.

NOTE

Dowdall, *Pleading "Material Facts"*, 77 Pa. L. Rev. 945, 949-950 (1929)*: "If a one-legged man strikes a woman and kills her, then the fact that he has only one leg is material in the sense that it is relevant to his identity, and if he is on trial for murder it is a material part of the evidence against him. But the fact that he has only one leg is not a material part of the offence with which he is charged. The distinction is so manifest that it would be absurd to allude to it if it were not often overlooked, and indeed there are cases in which it is so much

more prejudicial than they are in the statement of facts constituting a defense. A plaintiff is not required to plead to the defense, as the allegations therein are deemed denied. A defendant, however, is aggrieved by being put to the necessity of answering immaterial allegations not merely introductory to the statement of the cause of action."

* By permission of University of Pennsylvania Law Review.

less obvious that a somewhat striking illustration has been given in order to make the distinction clear. This is all the more necessary because the word 'material' is used, and has been used for at least three hundred years, in both these senses, not only in the daily usage of bench and bar, but also in legal literature. This equivocal usage has indeed been so common and so well supported that it could not possibly be described as improper; but in connection with pleading, with which we are now concerned, the latter of the two senses above exemplified has, strictly speaking, a certain claim to be regarded as 'proper'. For, in the technicalities of pleading, whenever the word is used technically, it has been used almost exclusively in that sense for a very long time. Thus when Lord Coke tells us that an issue must be single, certain and material, or when in the great days of special pleading there was discussion as to whether a traverse was on a material point, or whether a variation was material, or the like, in all such cases the word is generally used, and is often expressly used, to signify a point which will be decisive of the action or one which is an essential element of some claim or right, as distinguished from that which is merely relevant to the proof thereof."

DUKE v. CRIPPLED CHILDREN'S COMMISSION, INC.

Supreme Court of North Carolina, 1938. 214 N.C. 570, 199 S.E. 918.

SCHENCK, J. The plaintiff, a minor suing by her next friend, alleges that while a patient in a children's hospital maintained and operated by the defendant she was injured by the negligence of the defendant and its agents.

Paragraph 13 of the complaint is as follows: "13. That the plaintiff is informed, believes and alleges that a recovery in this suit will not impair or diminish the trust property in the hands of said corporation donated for charitable uses, and said plaintiff is informed, believes and alleges that the defendant has made special arrangements to pay any and all judgments that might be rendered against it on account of its negligence or the negligence of its servants and agents." ¹

¹ Cf. Prosser, Torts, 1063 (1941): "Certain classes of defendants are given immunity from liability for conduct which would otherwise be tortious, because of reasons of policy involving the protection of the defendant himself, or of interests of social importance which he represents. Such immunity is conferred upon: . . . d. Charitable organizations. In some jurisdictions this immunity is almost complete; in others it is limited to nonliability to the recipients of charitable benefits, or for the acts of subordinate servants as distinguished from managing agents." Cf. also Note, 19 N. C. L. Rev. 245, 250-251 (1941): "The effect of the existence of liability insurance on the right of a beneficiary to recover from a charity is widely debated. . . . North Carolina apparently denies recovery to a tortiously injured beneficiary on the ground that public policy favors keeping the charity intact. Such being the case, it would seem that where liability insurance exists the reasons for exempting charitable institutions have disappeared, at least to the extent that recovery would be covered by such insurance.

A desirable solution where insurance exists is reached in Colorado and Tennessee, whose courts rule that non-liability extends no further than necessary

Before time for answering expired the defendant lodged motion that paragraph 13 "be stricken from said complaint for that and in that the same constitutes improper pleading, is immaterial, irrelevant and prejudicial." C. S., 537.

The motion was denied and defendant reserved exception and appealed to the Supreme Court, assigning as error the denial by the court of its motion to strike.

It has been repeatedly held by this Court that in an action for damages for a personal injury evidence that the defendant's liability for the act complained of has been insured by a third person, is ordinarily incompetent. *Lytton v. Mfg. Co.*, 157 N. C. 331, 72 S. E. 1055; *Luttrell v. Hardin*, 193 N. C. 266, 136 S. E. 726, and cases there cited; *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756, and cases there cited.

By the same token that evidence that the defendant is insured in a casualty company is incompetent, evidence that "the defendant has made special arrangements to pay any and all judgments that might be rendered against it on account of its negligence or the negligence of its servants and agents" is incompetent—both are "entirely foreign to the issues raised by the pleadings." *Lytton v. Mfg. Co.*, *supra*, and other cases cited.

Inasmuch as evidence in support of the allegation in paragraph 13 of the complaint would be inadmissible, it follows, under the decisions of this Court, that such allegations in the complaint should be stricken as irrelevant, immaterial and prejudicial. "It is readily conceded that nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. C. S., 506; 21 R. C. L., 452." *Pemberton v. Greensboro*, 203 N. C. 514, 166 S. E. 396. "On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial." *Trust Co. v. Dunlop*, *ante*, 196.

It should be noted that the complaint does not allege that the defendant is claiming any immunity from liability for its torts by reason of its being a charitable institution—nor even that the defendant is a charitable institution.

The order of the Superior Court denying the motion of the defendant is

Reversed.²

to protect the charitable trust from diversion; so that a tort judgment may be allowed against the institution, though only to be satisfied to the extent of the insurance, which will not affect or deplete the trust property." See *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 820 n. 40, 823-824 (App. D. C. 1942).

² Cf. *Town of Wadesboro v. Cox*, 215 N. C. 708, 2 S.E.2d 876 (1939).

KRAUSNICK v. HAEGG ROOFING CO.

Supreme Court of Iowa, 1945. 236 Iowa 985, 20 N.W.2d 432.

Action for damages for personal injury causing death of plaintiff's intestate. Plaintiff appeals from an interlocutory ruling striking certain parts of Count II of his petition.

Affirmed and remanded.

SMITH, JUSTICE. Count I of plaintiff's petition alleges that plaintiff's five year old intestate was killed on October 2, 1943, by a truck driven by defendant Seilhamer while intoxicated and with the consent of defendant Haegg Roofing Co., the owner thereof. The action as against the owner is predicated on such consent alone. Specifications of negligence of Seilhamer as the proximate cause of the claimed injury are of course included.

Count II alleges that defendant Seilhamer was an employee of his codefendant and that the claimed injury occurred as he was returning the truck to his employer's garage after work. It, too, contains allegations of negligence of Seilhamer as the proximate cause of the injury.

Count II also contained various allegations to the general effect: That defendant Seilhamer had been in the employ of defendant Haegg Roofing Co. for a number of years; that he was a man who often became intoxicated and was not a competent person to be in charge of or driving the truck; that defendant, Haegg Roofing Co., knew this fact, or in the exercise of reasonable diligence should have known it; that knowing it, said company was negligent in permitting him to drive the truck on the day in question; that it knew on the forenoon of said October 2, that its said employee on said day had been drinking intoxicating liquor and was partially intoxicated and not competent to be driving the truck and that on divers occasions he was in the habit of driving it for his own personal use; and that the negligence of Haegg Roofing Co. in all these respects combined with the other negligent acts alleged, was the proximate cause of the injury that resulted in the death of plaintiff's intestate.

These last enumerated allegations were on motion stricken from the petition and from this ruling plaintiff, having obtained permission under Rule 332, Iowa Rules of Civil Procedure, appeals.¹ Haegg Roofing Co. will be referred to as appellee.

I. It will be observed Count II pleads a cause of action based on the theory of respondeat superior. Allegations of the

¹ For the provisions of this Rule, see *infra* p. 490.

relationship of master and servant and that the injury occurred while the servant was returning the truck to the owner's garage after work would be immaterial otherwise.

On the other hand, the stricken portions were quite immaterial to a cause of action based on the theory of imputed negligence because of the relationship of master and servant.

The cases cited by appellee are quite conclusive to the proposition that the master's liability to third persons for injuries negligently inflicted by the servant while in the course of his employment is based on the specific negligent acts of the servant being imputed to the master, and not on original negligence of the master in employing a careless and incompetent servant. See *Black v. Hunt*, 96 Conn. 663, 115 A. 429; *Minot v. Snively*, 8 Cir., 172 F. 212, 19 Ann. Cas. 996; *Denver City Tramway Co. v. Cowan*, 51 Colo. 64, 116 P. 136; *Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135.

We think the ruling of the court must be affirmed on the ground that the stricken portions embodied subject matter that was immaterial and irrelevant to the cause of action based on respondeat superior. Motion is the proper remedy for improper joinder of actions and the court properly struck the cause that was improperly joined. Rule 27 (b) Iowa Rules of Civil Procedure.²

II. But the motion to strike urged another ground, viz., that the stricken portions of the petition constituted an attempt to plead a theory of liability "unknown to the law." The ruling of the court was general and did not reveal upon what ground it was based. An unqualified affirmance here might be construed as sustaining this ground.

The argument of appellant on appeal is directed principally to this attack. He argues for a theory of liability entirely distinct from that pleaded in Count I and also entirely distinct from one dependent on the relationship of master and servant or principal and agent.

This theory is that the owner of a motor vehicle may be held liable for a resulting injury to a third person upon the ground of negligence if he knowingly entrusts its operation to an inexperienced or incompetent driver. [Citations omitted.]

This is on the principle that though the automobile may not be technically a dangerous instrumentality it is neverthe-

² This rule provides: "(b) Actions. The only remedy for improper joinder of actions shall be by motion. On such motion the Court shall either order the causes docketed separately or strike those causes which should be stricken, always retaining at least one cause docketed in the original case. Before ruling on such motion, the party whose pleading is attacked may withdraw any of the causes claimed to be misjoined." Acts Reg. Sess. 50 G. A. Iowa, 291 (1943).

less one capable of doing great damage in the hands of an incompetent driver. [Citations omitted.]

In cases of the kind we are now discussing liability does not rest on the rule of respondeat superior [citations omitted] but upon the combined negligence of the owner and the driver, the owner's negligence consisting in the act of loaning the car to an incompetent driver and the latter's negligence in its operation. [Citations omitted.]

No Iowa case is cited in support of this theory and we have found none. However, it seems to be well established as a common law proposition and we must hold it is in effect here unless it has been abrogated by statute.

III. Appellee contends that the rule is "inapplicable" in view of our consent statute, section 5037.09, Iowa Code 1939, (Sec. 5026, Iowa Code 1924) which provides: "In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage."

We think the contention unsound. It is true the statute does in one way broaden the common law rule of liability. [Citations omitted.]

But none of these cases cited by appellee leads to the conclusion that the statute has entirely replaced all common law rules of owner's liability. It has created liability in some situations where none existed before. It does as appellee says, impose liability on the owner for the negligence of the driver *whether he knew the driver was incompetent or not*.

But that is true only if the car is being driven with his consent *at the time of the injury*. If it was placed in the driver's possession for a specific trip or purpose, there is no liability of the owner under the statute if injury to a third person results from negligent operation of the vehicle while being used for a different and unauthorized purpose. [Citations omitted.]

We see no reason for holding in the latter case that the common law rule of liability might not be invoked against the owner, if he negligently placed the vehicle in the hands of a known incompetent driver, thereby making possible the injury to others by reason of negligent operation, even though the particular use at the time of the injury was beyond the scope of his consent. It would have to appear, of course, that such independent negligence of the owner proximately caused the injury complained of.³ . . .

³ At this point the court cited and distinguished certain Michigan cases and an analogous Michigan statute.

The decision of the trial court is affirmed for the reasons heretofore stated, but without prejudice to appellant's right to plead separate causes of action in separate counts if he shall so elect. Affirmed and remanded.

All Justices concur.⁴

⁴ Cf. *Whitlow v. Southern Railway Co.*, 217 N.C. 558, 559, 8 S.E.2d 809 (1940).

Chapter VI

'THE PROCEDURAL REGULARITY OF THE STATEMENT OF FACTS

SECTION 1. ULTIMATE FACTS AND EVIDENTIAL FACTS: MATERIALITY AND RELEVANCY

MICHAEL ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1253-1254, 1259-1260, 1264, 1271, 1273-1274, 1278-1279.

The material propositions which are disputed, that is, alleged and traversed, are the propositions to be proved. For every material proposition to be proved there is, of course, a contradictory proposition to be proved which, as we shall later see, means that every disputed material proposition can be said to be a proposition both to be proved and to be disproved. The only way in which a proposition can be disproved is by the proof of its contradictory.¹ We shall speak of these material propositions and their contradictories as ultimate propositions to be proved or ultimate probanda. In the course of a trial other propositions will almost always be proved, but although they are probanda they are not ultimate probanda. An ultimate probandum is always a material proposition. It cannot be said that an ultimate probandum is only a proposition to be proved and never a proposition used in the proof of some other, since one material proposition can sometimes be used in the proof of another. Ultimate probanda are precisely defined by saying that they are material propositions in dispute and hence to be proved. They mark the *termini ad quem* of the proof stage of a trial of issues of fact. The process of proof is directed toward them; the process of persuasion is concerned with them.² . . .

¹ Just as we can speak of the issues as formed either by the allegation of contradictory propositions or by the allegation and traversing of the same proposition, so here it is indifferent whether we view the process of proof as proof of contradictory propositions or as the proof and disproof of the same proposition. The reader must remember that our use of the word "proof" does not involve persuasion of the jury. It is clear that the jury could not be persuaded to assert a proposition and also to assert its contradictory. [All footnotes are the authors' but they have been renumbered.]

² The phrase "facta probanda" occurs in traditional usage, but a fact cannot be proved or disproved any more than it can be alleged or traversed, affirmed or denied. By a probandum we shall therefore always mean a proposition to be proved. What is called an ultimate factum probandum, an ultimate fact to be proved, we shall speak of as an ultimate probandum, an ultimate proposition to be proved. That a fact cannot be proved or disproved follows from the circumstance that it cannot be affirmed or denied. We shall subsequently see that the process of proof consists of a series of acts of assertion. If facts are not capable of being asserted, they cannot enter *directly* into the process of proof.

. . . Issues of fact are constituted, as we have seen, by material propositions which are ultimate probanda. If a proposition is not material it cannot be involved in an issue of fact, even though it may be disputed in the course of the trial and even though the resolution of such dispute may be subsidiary to the resolution of the principal dispute. The distinction here is between evidential and material propositions. We shall return to it in a later discussion of relevancy and materiality. The distinction is recognized by the rule of pleading which makes it insufficient to plead evidential propositions from which material propositions can be inferred. It is usually impossible to allege only material propositions in a complaint; other propositions which perform an explanatory function must often be added; and such propositions frequently report evidence that will be introduced in the course of the trial. It is not objectionable to plead evidence, but it is objectionable to fail to plead a material proposition and to allege instead of it evidential propositions from which it is hoped it can be inferred. The problems connected with the administration of this rule are those involved in the determination of materiality by reference to rules of substantive law.

Not only must ultimate probanda be material, but they must be propositions of fact. In this connection arises the difficult and subtle distinction between conclusions of fact and conclusions of law. By a conclusion of fact is meant an elementary proposition of fact which is capable of being proved and hence is capable of being an ultimate probandum if material and if disputed. By a conclusion of law is meant a legal statement which is elementary and is thus distinguished from a *rule* of law which is a general legal statement. Strictly, it cannot be proved and hence is incapable of being an ultimate probandum even though it is in some sense material and though disputed. The rule that conclusions of law should not be pleaded is, therefore, justified in the sense that if a conclusion of law is alleged and traversed, conclusions of fact will have to be substituted for it before proof can be accomplished. It is not necessary for our present purpose to discuss the criteria by which it is decided whether a given proposition is a conclusion of fact or a conclusion of law, or to analyze the formulae which govern the substitution of propositions of fact for it, if it is a conclusion of law. Moreover, prior to an analysis of proof and inference, it is impossible to explain why a conclusion of law cannot be proved in the sense in which a proposition of fact can be proved. Finally, it is indifferent whether or not the rule that conclusions of law should not be pleaded is strictly enforced or whether or not it is possible strictly to enforce it. Since we are concerned

with pleading as preparatory to a process of proof, it matters only that, however pleaded, disputed material propositions be conclusions of fact at the stage of proof, for otherwise they could not be proved by propositions which are exclusively propositions of fact.

The significance of these two doctrines can be summarized by the statement that the ultimate probanda of judicial proof must be material propositions and must be conclusions of fact.³

. . .

We have previously distinguished between elementary and general propositions, the former reporting knowledge of matters of fact, of particular things and their attributes and the events in which they are involved, the latter reporting knowledge of the relation of kinds or classes, of which particular things, attributes and events may exist as instances. Elementary propositions may be either immediate or demonstrable; if demonstrable they can be asserted only as probable and never as true, whether proved or assumed. General propositions may be either immediate or demonstrable; if demonstrable they may be asserted either as true or as probable, according as they express adequate or inadequate knowledge, and whether proved or assumed. That a demonstrable elementary proposition can be asserted only as probable means that the knowledge we pos-

³ We said above that the rules of substantive law which govern particular litigious controversies can be viewed as statements of the specific factual conditions upon which legal consequences depend. However, it would be an error to suppose that the relation of "following" which can be said to obtain in every case between the legal consequence and the particular factual conditions from which it follows is an inferential relation, that is, to suppose that the former is inferred from the latter. Here, the relation of "following" is a legal and not a logical relationship. This throws light on the statement in the text that a conclusion of law cannot be said to be proved in the sense in which a proposition of fact can be.

In view of what is said in the text about fact and law we must explain our prior statement that the antecedent terms of a rule of law are factual universals or conditions. The antecedent terms as well as the consequent term of a rule of law are always legal concepts or ideas although they are usually, if not always, symbolized by common names or indefinite descriptive phrases which in common speech symbolize abstractions from experience. They are factual in the sense that they stand in a certain relation to the legal universals which are the consequent terms of rules of law, that is, as we have said, they prescribe the conditions of legal action of one sort or another. They are factual in the further sense that, although as constituents of rules of law they are legal terms, they are always defined partly and usually exclusively in factual terms, a process which is facilitated by the use of words to symbolize them which also symbolize abstractions from experience. However, in many cases this makes it extraordinarily difficult to determine whether a given allegation is a conclusion of fact or a conclusion of law, since the predicate term may have been used by the pleader either as a legal term or as a factual term. Moreover, in the case of those legal concepts, such as the concept of negligence, which cannot be completely defined in factual terms, in cases, in short, in which the legal terms signify not only kinds of facts but evaluations of those facts, the allegation of conclusions of law is often unavoidable. The allegation of conclusions of law will usually be unavoidable if the factual conditions stated by the pleader have not been previously evaluated authoritatively. In this sense the issues of fact in a litigation are not always exclusively issues of fact but mingled issues of fact and of law.

sess of matters of fact as a result of inference is always intrinsically inadequate. . . .

Proof can be defined as a process in which one proposition is asserted as true or probable as the result of the assertion of one or more other propositions as true or probable. Proof or inference is thus an operation performed by the mind consisting of acts of assertion. That it is a proposition which is proved and that propositions are probative follow from the circumstance that propositions express actual or potential knowledge, and that proof or inference is a process in which the mind passes from what it actually knows, expressed by the propositions it is able to assert as true or probable, to what it previously did not actually know, stated by a proposition it was unable to assert. As a result of this transition it becomes able to assert the latter proposition as true or probable; in other words, the transition involves a gain in actual knowledge. Those who speak of facts being proved or facts proving facts fail to recognize that proof is an affair of knowledge and hence of propositions; facts are involved in so far as the knowledge may be of matters of fact, but of course it need not be.⁴ . . .

The types of inference or proof are distinguished by the kinds of propositions which comprise their premises and conclusions. Thus, an inference in which the probandum is a general proposition and the probantia are general propositions is to be distinguished from an inference in which the probandum is an elementary proposition and the probantia are a general and an elementary proposition. It is this latter type of inference which, with one or two exceptions not here to be noted, occurs throughout judicial proof. The ultimate probanda are always elementary propositions, and other probanda, which we shall call intermediate, are for the most part elementary propositions.⁵

⁴ It is even more unfortunate to speak of facts proving propositions, or propositions proving facts, because such speech seems to recognize a distinction between facts and propositions, only to violate it. The error that is made in the statement that facts prove facts can be easily eliminated by seeing that what is meant is that knowledge of some facts is employed to gain knowledge of another fact, that is, that propositions of fact prove propositions of fact. But if the words "fact" and "proposition" are given different meanings, it is almost impossible to make intelligible the statement that facts prove propositions or propositions facts.

⁵ We shall not distinguish between elementary singular and elementary plural propositions. The latter sometimes occur as premises in judicial proof. The type of inference in which an elementary plural proposition is proved either by two elementary plural propositions or by an elementary plural proposition and a general proposition, and that in which an elementary singular proposition is proved by an elementary singular proposition and an elementary plural proposition, are to be distinguished from those mentioned in the text. Furthermore, the exception before mentioned concerning the proof of one proposition by another occurs only in the case of two elementary plural propositions. We shall proceed, however, to treat the usual case in which the elementary proposition is singular rather than plural;

An elementary proposition can be proved only by a conjunction of propositions, and never by a single proposition. The premises must consist of one general proposition and one or more elementary propositions; never exclusively of two or more general propositions or of two or more elementary propositions. The rule for this type of inference can be formulated as follows: Let P represent the elementary premise; we can state the form of any demonstrable elementary proposition by: "This is such and such." "This" stands for any proper name or definite description; "such and such" for any common name or indefinite description; if the elementary proposition were immediate instead of demonstrable "appears to someone to be" would be substituted for "is." Let Q represent the general premise; we can state the form of any general proposition by: "To be such and such is to be so and so."⁶ "So and so," like "such and such," stands for any common name or indefinite description. Then R, the elementary conclusion, must be of the form: "This is so and so." Our rule of inference, therefore, reads as follows: *If this is such and such and if to be such and such is to be so and so, then this is so and so.* If we are able to assert as true or probable that this is such and such and that to be such and such is to be so and so, we can say: *therefore this is so and so*; in other words, that this is so and so must be asserted as true or probable, which ever the case may be. . . .

. . . It is evidence which usually is said to be relevant or irrelevant. Clearly, it is not the actual things or events which are exhibited to the tribunal that are subject to such qualification; it is the knowledge which the tribunal gains from observing them that either has or has not a bearing on the matters in issue. By a bearing here is meant no more than that such knowledge can help to resolve the issues. It can do this only by being employed in the process of proof and disproof which leads ultimately to the affirmation or denial of the propositions to be proved which are material in the case. Relevant knowledge is thus knowledge which can be employed probatively with respect to material propositions to be proved. . . .

and whenever we use the phrase "elementary proposition" without further qualification we shall mean an elementary singular proposition.

⁶ There are other ways of stating the form of general propositions, such as, "Being such and such is being so and so," "Such and such implies so and so," "If this is such and such then this is so and so." The last two of these methods of statement are objectionable because of confusions to which they lead. The meaning of the word "implies" is often confused with the meaning of the word "yields" which appears in the formulation of a rule of inference; similarly, we use the words "if" and "then" in order to state the rule of inference and it is better therefore to avoid using the same words in stating general propositions wherever this is possible.

To be relevant in judicial proof and to be probative are not strictly synonymous. Generally, it can be said that if one proposition is probative of another, it is relevant to that other. Relevancy has this meaning in judicial proof, but it has a further condition to satisfy. An evidential proposition is, of course, relevant to a proposition if it is probative of it in a single step of proof; but if this proximate probandum is not also an ultimate probandum, the given evidential proposition will or will not be relevant in the case according as it is or is not indirectly probative of a material proposition. Relevancy in judicial proof, therefore, means being probative directly or indirectly of any material proposition which is an ultimate probandum. Indirect relevancy is the same as indirect probativity; it is based on the transitive nature of the inferential relation. Thus, if P . . . is relevant to Q, its proximate probandum, and if Q . . . is relevant to T, its proximate probandum, then P is indirectly relevant to T, its remote probandum, and if T is a material proposition P is relevant in the given case.⁷

Relevancy is thus entirely a matter of logic. Whether or not one proposition is relevant to another is determined solely by the rational criteria provided by the principles of inference. But relevancy in a trial before a judicial tribunal is restricted by one condition which logic does not impose, namely, that the proposition be directly or indirectly relevant to a material proposition. The rules of substantive law determine whether a proposition is material, and in this respect they have some bearing on whether a proposition which is offered probatively is relevant in judicial proof.⁸ . . .

PROBLEMS

With respect to each of the following cases ask yourselves:

1. Whether the propositions to which objection was taken were material or immaterial to the plaintiff's cause of action?

⁷ A proposition can be probative of two or more different propositions and in this sense can be multiply relevant. A proposition may be admitted in a given case as relevant to two different propositions. A proposition may be offered as relevant to two different propositions and admitted as relevant to one of these although excluded as irrelevant to the other. The capacity of a proposition for multiple relevancy and multiple admissibility must be remembered throughout the following discussion.

⁸ Whether or not a proposition is material is determined by rules of substantive law. Whether or not a proposition is relevant to a material proposition is not determined by any rule of law but by the principles of logic. When it is said that a proposition offered as evidential is immaterial and irrelevant what must be meant is that the proposition is not relevant in the case because not relevant to a material proposition in that case. Propositions which are exclusively evidential are never material or immaterial, but, as we have seen, a material proposition may also be used probatively and in this sense it may be evidential as well.

2. Whether, if immaterial, they were relevant or irrelevant to any proposition which was material to the plaintiff's cause of action?

3. If relevant, in what argument were they capable of being employed to prove the proposition to which they were relevant?

4. Should a plaintiff be forbidden or permitted to allege propositions which are immaterial to his cause of action but which are relevant to propositions which are material thereto, and for what reasons?

5. Suppose that a complaint does "state facts sufficient to constitute a cause of action": Is it nevertheless permissible to demur thereto on the ground that it does not, and, if so, in what situations? Should it be permissible to do so?

PARRISH v. ATLANTIC COAST LINE RAILROAD COMPANY

Supreme Court of North Carolina, 1942. 221 N.C. 292, 20 S.E.2d 299.

This action was brought to recover damages for personal injuries sustained by plaintiff in a crossing collision in the city of Rocky Mount between an automobile operated by him and a train operated by defendant.

The defendant, before filing answer or demurrer or obtaining an extension of time to plead, moved to strike certain paragraphs of the complaint as being "irrelevant, redundant and impertinent," specifically relying on C. S., 537.¹

The matter objectionable to the defendant was as follows:

(1) In support of his allegation of negligence in the maintenance and care of the crossing the plaintiff alleged (a) that there were three sets of tracks at this crossing, (b) that the crossing was "maintained with rough boards, large cinders or burnt coal, clinkers and dirt, and the railroad bed, beyond the end of the said boards . . . constructed and maintained of large cinders or burnt coal clinkers and coarse gravel and dirt and projecting railroad cross-ties," (c) that the view of the tracks was obstructed by a three-foot dirt bank, on which were a wire fence, several buildings, warehouses, etc., and a spur track occupied by twelve or fifteen freight cars, all of which made this a blind crossing, and (d) that the freight cars on the spur track were moved the day following the accident, this removal showing knowledge and an admission by the defendant of its negligence in thus obstructing the view at the crossing.

¹ This statute provides: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. . . ."

(2) In support of his allegation of negligence in the operation of the train involved in the collision, the plaintiff alleged (a) that certain of the employees who were operating the train were discharged, suspended, or reduced in rank following the accident, and (b) that the defendant permitted plaintiff to lie on its roadbed, unconscious, for nearly an hour, "although it had a locomotive and train upon which plaintiff could have been removed to a hospital maintained by defendant in the City of Rocky Mount."

The court struck the allegation as to the three sets of tracks, but denied the motion as to the remainder of the matter objected to.

From the order denying its motion to strike the above described paragraphs, the defendant excepted and appealed.

SEAWELL, J. . . . The relevancy of an allegation, like the relevancy of evidence, depends upon the purpose which the particular legal instrument is intended to fulfill. The purpose of an allegation in a complaint, broadly speaking, is to state a fact which, when considered with other facts, will constitute a cause of action. The purpose of evidence is to prove competent allegations. The relevancy of either depends upon its tendency to fulfill its purpose.² The rules concerning the relevancy of evidence, although helpful in analogy, have no bearing on the relevancy of the allegations, for, strictly speaking, it is by the competent allegations that the relevancy of the evidence is to be judged—whether the evidence tends to prove facts properly alleged as a cause of action in the complaint. This makes the relevancy of the allegations the subject of independent inquiry, divorced, except by analogy, from the rules concerning the relevancy of evidence.

Looking at its purpose, an allegation is relevant which *tends*, as an element thereof, to express the cause of action on which relief is sought.³ . . . Thus, in the instant case, even though the questioned allegations standing alone would be insufficient to set up negligence, or are not coupled with other allegations which would make up a cause of action, if they do amount to an element of the cause of action, they would be relevant, and should not be stricken—at least for irrelevancy. In applying such a test it is, of course, necessary to consider what elements go to make up a cause of action, but the inquiry is not one of the sufficiency of the complaint as a whole to state a cause of action. . . . This question can only be raised by demurrer. C. S. 511 (6). The motion to strike does not raise it, and, as a practical matter, such a motion would not be made if there were no statement of a

² In how many and in what senses is the court using the word "relevancy"?

³ This and all subsequent omissions from this opinion are of citations.

cause of action. Nevertheless, if the particular allegation of negligence, as appearing upon the face of the pleading, cannot have any proximate relation to the injury complained of, it should be stricken as irrelevant.

Redundancy in pleading does not present quite the theoretical and technical problems posed by the subject of relevancy. It would seem to include anything which is unnecessary to "a plain and concise statement of the facts constituting a cause of action," C. S., 506 (2), such as unnecessary repetition, and the detailed statement of evidential matters, however relevant the latter may be when presented upon the trial. McIntosh, *North Carolina Practice and Procedure*, §§ 350, 371. (McIntosh considers evidential matters in a complaint as irrelevant. It would seem more accurate to class them as redundant, but this is probably only of academic interest.)

In applying these tests to the paragraphs of plaintiff's complaint objected to by the defendant, it must be remembered that although the objectionable paragraphs appear as subdivisions of two main paragraphs, one alleging negligence in the maintenance of the crossing, and the other alleging negligence in the operation of the train, still these main paragraphs are merely parts of the whole complaint, setting up injury to the plaintiff caused by defendant's negligence in the conduct of its railroad. This is the main issue, and the relevancy of the subdivisions must be considered from this standpoint—whether they have any relation to the injury of which the plaintiff complains.

(1) (b) Although, as pointed out by defendant in its brief, the condition of the crossing played no part in the accident as it is set out in the complaint, still it cannot be said that this allegation has no relevancy to the plaintiff's claim to recovery. A railroad must maintain public crossings in a safe condition for the use of the traveling public. . . . The manner of construction may very easily be negligent, and, although the allegation in the present complaint, standing alone, would not be sufficient to support an action for negligence in the maintenance and condition of the crossing, still it can and must be considered as a pertinent part of a complaint which would support such a cause of action, and as such is relevant. There is no sign of unnecessary repetition here, nor is it possible to say that the allegation is purely evidential, and thus redundant. The motion to strike this subparagraph was properly overruled.⁴

⁴ Is a proposition ever more than conditionally material to a cause of action and is not the condition of its materiality the allegation of one or more other propositions which are likewise only conditionally material to the cause of action? And if a plaintiff fails to satisfy the condition of the materiality of any propositions which he alleges by alleging those propositions upon the allegation of which the

(c) The allegations as to obstructions of the view were properly allowed to remain in the complaint. It is necessary, in stating a cause of action, to set forth the duty which the defendant owed the plaintiff, as well as the manner in which the violation of that duty proximately contributed to the plaintiff's injury. McIntosh, *op. cit.*, *supra*, § 359. Here, the obstructions which made this a blind crossing are a vital element of one of defendant's duties to plaintiff. Obstructions in themselves have never been considered negligent . . . ; but if they exist, and the railroad is aware of them, it is then incumbent on the railroad to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains. . . . This duty arises from the existence of obstructions to the view, and the failure to discharge it, resulting in injury to the plaintiff, may be a basis of plaintiff's claim to recovery. At any rate we cannot say that the allegation of the blindness of the crossing, although not coupled in this particular paragraph with any of the other elements which are necessary to give such an allegation force, is irrelevant to the plaintiff's cause of action, or has no relation to his injury. It is very pertinent to the establishment of a duty which defendant owes to plaintiff.⁵

The plaintiff is apparently aware of this, for in paragraph six of the complaint he alleges a failure to warn users of this blind crossing of the approach of trains, thus giving the bare allegation of obstructions a *raison d'être*, and therein again sets forth the existence of these obstructions. Although this is repetitive, it is not of a sufficiently serious nature to be characterized as unnecessary repetition, or redundancy, entitling defendant to have the questioned paragraph stricken for that reason.

(d) The allegation that some of the obstructions of the view at the crossing—namely, the defendant's freight cars—were moved by the defendant after the accident, can have no relevancy, as we have analyzed the term, to plaintiff's cause of action. It does not set forth any element thereof, nor does the removal have

materiality of the former is conditioned, are not the propositions alleged thereby rendered immaterial to his cause of action?

⁵ Cf. Truelove v. Durham & Southern Railway Co., 222 N.C. 704, 24 S.E.2d 537 (1943): Action to recover damages for wrongful death resulting from a collision between one of defendant's trains and an automobile driven by plaintiff's intestate. Plaintiff alleged that the train had left a town, approximately three miles away, about half an hour before it was scheduled to do so; that plaintiff's intestate knew and relied upon the schedule; and that had the train been running on schedule the collision would not have occurred. *Held*, that defendant's motion to strike these allegations from the complaint as irrelevant should have been granted. "If the fact that the train was not running on schedule affected the degree of care either [plaintiff's intestate or defendant] was required to exercise under the circumstances, it is probative only. . . . That a train was or was not then due to pass, to the knowledge of the motorist, is merely a circumstance bearing upon the question of due care."

any proximate relation to plaintiff's injury. In personal injury suits of this kind, occurrences *after* the accident which do not go to the enhancement or aggravation of plaintiff's injuries are clearly of no importance in setting forth the details of defendant's negligence by which plaintiff was injured. This paragraph should have been stricken as irrelevant. It is at best the pleading of evidence, and should therefore also be stricken as redundant. It might be wise to point out that in this State, as in most states, for motives of public policy, evidence of this character is not admissible to show either negligence or an admission of negligence. *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51; *Shelton v. R. R.*, 193 N. C. 670, 139 S. E. 232; *Alabama Great So. Ry. v. Ensley Transfer & Supply*, 211 Ala. 298, 100 So. 342; Wigmore, Evidence (3d Ed.), Vol. 2, § 283; 45 C. J., 1232. Certainly, therefore, an allegation in this vein would not be proper.⁶

(2) (a) Precisely those considerations which are determinative of the relevancy of the allegation just considered apply with equal force to the allegation that defendant, after the accident, disciplined certain of the employees who were operating its train. Although the defendant may have been negligent in a multitude of ways in the conduct of its railroad, it is hard to see how disciplining its employees after plaintiff had been injured could have been one of them. The allegation is clearly irrelevant. It also is at best the pleading of evidence and is therefore subject to striking for redundancy. Furthermore, evidence to this effect is inadmissible to show either that the employee was negligent, or that the employer thereby admitted the employee's negligence. *Southern Ry. v. Smith*, 223 Ala. 583, 137 So. 398; *Engel v. United Traction Co.*, 203 N. Y. 321, 96 N. E. 731; *N. Y. Polyclinic Med. School v. Mason-Seaman Transp. Co.*, 155 N. Y. S. 200. Defendant's motion to strike this paragraph should have been allowed.

(b) Although the allegation that defendant did not do all it could have to mitigate plaintiff's injuries does not have any direct bearing on the question to which it is subordinate—negligence of defendant in the operation of its train—still it is of importance on the question of damages if defendant is proven to

⁶ Cf. *Revis v. The City of Asheville*, 207 N.C. 237, 240-241, 176 S.E. 738 (1934), in which plaintiff sought to recover damages for personal injuries alleged to have been sustained as the result of the negligence of defendant in the construction and operation of a swimming pool in a public recreation park. In his complaint plaintiff alleged that defendant operated the pool as a business enterprise for profit; in its answer defendant alleged that it did so in the performance of the governmental function of providing its citizens with recreation and of thus promoting their health. In his reply plaintiff alleged, *inter alia*, that defendant carried public liability insurance upon the pool. The trial court ordered this allegation stricken from the reply as the allegation of a probative and not of an ultimate fact. On appeal plaintiff contended that this was erroneous since the evidence was relevant and competent. *Affirmed*. "We do not understand this to be the rule."

have been negligent. Although there is no duty to aid others imperiled without the defendant's fault, but through his conduct . . . ; yet, if plaintiff is hurt through defendant's fault, defendant must take all steps necessary to mitigate the hurt Since, if it is shown that plaintiff was injured by defendant's negligence, it will be of importance to determine if it discharged this duty, it cannot be said that this allegation is irrelevant or redundant. It was properly allowed to remain by the court below.

The order of the court below will be modified in accordance with this opinion, and as so modified, affirmed.

Modified and affirmed. .

NOTES

(1) L. Hand, C. J., in *The Evergreens v. Nunan*, 141 F. 2d 927, 928 (C. C. A. 2d 1944): "[A] 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an 'ultimate' fact; the second, a 'mediate datum.' 'Ultimate' facts are those which the law makes the occasion for imposing its sanctions."

(2) *Prudential Ins. Co. v. Moore*, 197 Ind. 50, 149 N. E. 718 (1925): Action by the beneficiary upon a life insurance policy. One of the questions was as to the sufficiency of plaintiff's allegations that on a certain date the insured "absented himself from his usual place of residence and went to parts unknown, and has absented himself from said place of residence ever since said time, and for a space of more than five years, and that he has not been heard of or seen by any one since said time." *Holding* these allegations to be insufficient, the court *said* (pp. 61-62): "It might be true, as alleged, that at the time the complaint was filed, the insured had been absent continuously for many years, during which he was not heard from, and yet he might be alive and might appear on the day of the trial, to testify as a witness. Plaintiff's right to recover depended on the ultimate fact that the insured was dead. And by whatever means that fact was to be established, whether direct testimony or proof of circumstances or presumptions, the complaint, either directly or indirectly, must allege the ultimate fact relied on, or it will not withstand a demurrer. A complaint which alleges only rebuttable presumptions or evidence tending to establish a fact on which the right of recovery depends, instead of alleging the fact itself, is not sufficient to withstand a demurrer, if all that is alleged might be true, just as stated, notwithstanding the non-existence of the fact or facts on which plaintiff's right to recover depends."

(3) *Williams v. Hayes*, 5 How. Pr. 470, 473 (N. Y. Sup. Ct. 1851): "A material fact stated in the complaint is, that the

mortgage in question has been paid. Upon this allegation a material issue might be made. Upon this issue, it would be very pertinent to prove another allegation in the complaint, that the mortgagee had in his life time, publicly stated that the mortgage was paid. This would be evidence tending to show that the mortgage was in fact paid; but could a material issue be made upon the latter allegation? Whether the mortgagee had said so or not, is only important as it may furnish evidence upon another issue, that is, whether the mortgagee had, in fact, been paid or not. In the language of Justice Selden, 'it is a fact which merely goes to establish *the essential fact*,' namely, that the mortgagee is really paid. The Code has nowhere provided that evidence, or, which is the same thing, facts which constitute evidence of an essential fact in the case, may be inserted in any pleading. On the contrary it limits pleadings to the statement of such facts as constitute a cause of action or a defence; or, in case of a reply, such facts as will avoid a defence."

(4) *Lubliner v. Ruge*, 21 Wash. 2d 881, 884-885, 153 P. 2d 694 (1944). Plaintiff sued to recover damages for personal injuries sustained by him as the result of a collision between his automobile and defendant's at the intersection of two streets. Plaintiff alleged that defendant was negligent in driving his automobile into the intersection at an unlawful rate of speed and against a red light. One of the errors assigned by plaintiff upon his appeal from a judgment for defendant was that the trial court refused to permit him to state in his opening statement to the jury or to prove that prior to the accident defendant had been drinking intoxicating liquor. Defendant contended that this was proper because the complaint contained no such allegation. Plaintiff contended that the intoxicated condition of defendant was evidentiary and, hence, that it was unnecessary to plead it. In that connection the court said: "The cases cited by appellant support the rule for which he contends; namely, that, if it appeared from the evidence that respondent was under the influence of intoxicating liquor at the time of the accident, such condition in and of itself would not constitute negligence, but could be considered by the jury as evidence bearing upon the question whether respondent was or was not guilty of one of the acts of negligence charged in the complaint, but in none of them does it appear that the question of pleading we now have before us was raised or decided.

"In deciding the question of pleading, we must take into consideration the foregoing rule; Rem. Rev. Stat., Vol. 7A, § 6360-119 (P. C. § 2696-877), making it unlawful to operate any vehicle upon a public highway while under the influence of or affected by the use of intoxicating liquor; the general rule that a pleading should allege ultimate facts, and not contain evidentiary matter; and that the adverse party should be apprised of that with which he is charged as a basis of liability with sufficient certainty so as to enable him to prepare for and meet it at the trial of the action. A violation of the statute is negligence as a matter of law. When the violation of a statute is relied upon as a basis of negligence, such statute need not be set forth in the pleading, but the facts making the statute ap-

plicable must be alleged. *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 194 P. 813. Evidence of being under the influence of or affected by the use of intoxicating liquor while driving an automobile or while doing any other act likely to do harm, is very damaging to one charged with negligence, and he should be informed of such charge so as to be able to gather and submit proof to the contrary. We, therefore, state the rule to be that, when a party to an action contemplates submitting affirmative proof that, by reason of the use of intoxicating liquor, there was thereby a contribution to some act or omission which it is alleged constituted negligence, such fact must be pleaded by such party. This was the ruling of the trial judge, and he was correct in such action."⁷

SECTION 2. ULTIMATE FACTS AND CONCLUSIONS OF FACT: PERCEPTUAL AND INFERENTIAL KNOWLEDGE

NOTE ON "CONCLUSIONS OF FACT"

Logically, a conclusion is the end of a syllogism, of a proof or inference. If it is a conclusion about a matter of fact, it is an elementary proposition, which, before it is proved or inferred, is a demonstrable or provable proposition and, after it is proved or inferred, is a derived or inferred proposition. Epistemologically, therefore, a conclusion of fact is inferential rather than perceptual knowledge, knowledge obtained indirectly through the exercise of the reason in inference rather than directly through the exercise of the senses in perception. Elementary propositions which are direct or perceptual knowledge are indemonstrable; they can not be proved.

Since the relationships between kinds or classes of things and events are never legally significant and since general propositions are potential or actual knowledge about such relationships, general propositions, although demonstrable, can never be material propositions although they can be relevant to material propositions, that is, they are capable of being used in the proof of such propositions. Nor can immediate propositions, although elementary, be material propositions, and this, for two reasons. First, a material proposition which is denied, is an ultimate probandum, a proposition to be proved, and immediate propositions are indemonstrable. Second, it is never legally significant that something can or has *appeared* to be the case but only that something *is* the case. But perceptual knowledge is always knowledge of appearances; what *is* the case can be known only indirectly.

⁷ Does this decision require the "pleading of evidence" in such cases?

It follows that if a rule prohibiting the pleading of conclusions of fact were administered according to logical and epistemological criteria it would be forbidden to allege demonstrable propositions and, hence, impossible "to state facts sufficient to constitute a cause of action" or, for that matter, a defense. Such a rule must therefore be administered according to legal, that is, practical, criteria; it must be permissible to allege some but not other demonstrable elementary propositions. On the basis of the following cases, you should therefore attempt to answer the following questions:

1. How do the courts distinguish between an ultimate or material fact, which may be stated, and a conclusion of fact, which may not be?
2. Should a litigant be permitted or forbidden to allege what according to legal criteria are conclusions of fact, and for what reasons?
3. Is the rule forbidding the allegation of conclusions of fact consistent with the rule prohibiting the pleading of evidence?
4. If a complaint alleges a conclusion of fact, is it substantively or only procedurally or formally defective? By what procedural devices may and should the defendant be permitted to attack the complaint as defective in that respect?

SHARP v. COX

Supreme Court of Kansas, 1944. 158 Kan. 253, 146 P.2d 410.

HARVEY, JUSTICE. Plaintiff brought this action for damages against four defendants—Vergil Cox, sheriff of Ness county at the time in question; John O'Brien, under-sheriff of Ness county; Charles Maupin, investigator for the Kansas Bureau of Investigation, and P. L. Smith.

As against the defendant Cox, plaintiff alleged a cause of action for false arrest and imprisonment. Cox's demurrer to plaintiff's petition was overruled, and no question is presented to us respecting the correctness of that ruling.

As to the other defendants, the petition alleges:

"The defendants, John O'Brien, Charles Maupin and P. L. Smith, and each of them, recklessly, oppressively, insultingly, willfully, unlawfully and maliciously and with design to oppress and injure plaintiff instigated, caused and procured the arrest and confinement of said plaintiff as aforesaid."¹

¹ Cf. Restatement, Torts § 653, comment b (1938): "Under the rule stated in this Subsection, one who procures a third person to institute criminal proceedings against another is liable under the same conditions as though he himself had initiated the proceedings."

O'Brien's separate demurrer, upon the ground that the petition does not state facts sufficient to constitute a cause of action against him, was sustained, and the joint demurrer of Maupin and Smith was sustained upon the same ground. Plaintiff has appealed from the ruling of the court, sustaining the demurrers of O'Brien, Maupin and Smith. In ruling upon the demurrer the trial court stated its reasons as follows:

"In sustaining the demurrers in behalf of the defendants O'Brien, Maupin and Smith, it is my conclusion that the language of the petition alleging that the defendants 'instigated, caused and procured the arrest and confinement of said plaintiff as aforesaid' is not sufficient. It does not charge them with doing any act, saying any words, or engaging in any described activity from which it could be inferred that they instigated, caused or procured the arrest of the plaintiff. In my opinion these words express conclusions only, and I think it is rather immaterial whether they be called conclusions of fact or conclusions of law.² They are in any case conclusions, as I view them, and not facts. It is the rule that a demurrer admits only facts well pleaded; so a demurrer does not in my view admit an allegation in the petition if the allegation amounts only to a conclusion of the pleader, unaccompanied by any statement of facts from which the pleader's conclusion is derived."

Appellant points out that defendants had filed no motion to have the petition made more definite and certain³ and argues that the language used should be liberally construed and all reasonable inferences indulged in to sustain the petition, citing *Owens v. Deutch*, 156 Kan. 779, 783, 784, 137 P. 2d 181. This principle has been many times recognized and applied, and yet it is difficult to see how defendants could prepare to defend a charge made in such general terms as stated in this petition. Our statute (G. S. 1933, 60-704, Second) requires the petition to contain:

"A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition."

It is difficult to see that the petition presents issuable facts. Inferences from facts pleaded generally are not substitutes for

² As judged by logical and epistemological criteria, what would you call them?

³ See Kan. Gen. Stat. Ann. § 60-741 (1935): "[W]hen the allegations of a pleading are so indefinite and uncertain that the nature of the charge or defense is not apparent, the court or judge may require them to be made definite and certain by amendment."

essential allegations of fact. See *Brane v. First National Bank*, 137 Kan. 403, 20 P. 2d 506, and authorities cited.⁴ . . .

We find no error in the ruling. The judgment of the court below is affirmed.⁵

NOTES

(1) *Al Raschid v. News Syndicate Co.*, 265 N. Y. 1, 3, 4-5, 191 N. E. 713 (1934): Plaintiff alleged in substance that he was a native born citizen of the United States; that defendant wickedly and maliciously and without probable cause gave false information to the immigration officials, which caused them to arrest, prosecute and deport plaintiff for alleged violations of the immigration laws; and that the proceedings terminated in plaintiff's favor. Motion to dismiss the complaint granted. *Affirmed*. (i) "One may not be liable for malicious prosecution and yet be legally responsible for maliciously circulating or giving false information resulting in intentional injury to another." (ii) [Consequently] "if the appellant had told us what the false information was he might have stated a good cause of action. He says the defendant maliciously without any justifiable excuse gave false information to the immigration officials which caused his arrest and wrongful deportation to his damage. We must know, however, what the information was. Even in libel and slander, which are actions founded in malice, the words written or spoken must be pleaded. The information may have been harmless and the statement that it caused his arrest a mere conclusion or surmise, not a fact. A complaint must contain a concise statement of the material facts which must be proved upon the trial. (Civ. Prac. Act, § 241.) For this omission the pleading is bad."⁶

⁴ In the part of the opinion omitted the court raises the question whether a cause of action against Cox for false arrest and imprisonment had not been improperly joined with a cause of action against the other defendants for malicious prosecution.

⁵ See *Lawson v. Higgins*, 350 Mo. 1066, 169 S.W.2d 881 (1943). Cf. *Taggart v. George B. Booker & Co.*, 3 Terry 386, 35 A.2d 499 (Del. 1943): "The rule is well established, both for the protection of the parties and in aid of the court, that it is not sufficient to state the result or conclusion of fact arising from circumstances not averred, nor to make a general statement of fact which will serve as a dragnet for all sorts of evidence. The terminal line between a conclusion of law and an ultimate, pleadable fact is not always easy to draw. Pleading ultimate facts, as distinguished from evidentiary facts, usually involves conclusions. Generally it is not necessary to plead evidence; and the rule requiring particularity is relaxed where the matter is peculiarly within the knowledge of the complaining party. A pleading is sufficient if it is intelligible to a person of ordinary understanding and affords him, the court and the jury the means of determining what is intended."

⁶ Cf. *Kalmanash v. Smith*, 291 N.Y. 142, 153-154, 51 N.E.2d 681 (1943): "That requirement [that pleadings contain a plain and concise statement of the material facts on which the party pleading relies] is not satisfied . . . by conclusory statements. General allegations of misconduct will not do in the absence of statements of those facts upon which are based the pleader's conclusions that the acts of which complaint is made are wrongful, lacking in good faith, or unlawful, as the case may be. 'A pleading which, fairly construed, fails to allege any facts which constitute a wrong but only general conclusions, is entirely insufficient and may be dismissed on that ground' . . . These rules grow out of an apparent purpose, in the interest of fairness and dispatch, to establish a system of pleading within our jurisdiction which would require of a party that he state his

(2) *Malin v. Southern Pacific Company*, 62 Ariz. 126, 154 P. 2d 790 (1944): The complaint alleged that defendant negligently stopped a train across a public highway and "negligently failed to provide warning signs or signals of the presence thereof, . . . knowing that the said railroad train constituted a hidden trap and danger to motorists using" the highway. The court dismissed the complaint for failure to state a cause of action and rendered judgment for defendant, and plaintiff appealed. *Affirmed*. (i) The allegation that the train constituted a hidden trap and danger was a pure conclusion. No circumstances were alleged tending to support it. (ii) To approve such an allegation is to open the door to pleadings without the essential details. Whether the train was "a hidden trap and danger" and defendant was therefore under a duty to warn motorists of its presence depends upon the circumstances, such as the time of day, the state of the weather, etc., and these should have been alleged.⁷

(3) *Southern Ry. Co. v. King*, 217 U. S. 524, 30 S. Ct. 594, 54 L. Ed. 868, (1910): Plaintiff contended that defendant was negligent in failing to comply with a statute which required railroads to install a post on each side of, and at a distance of 400 feet from, each grade crossing, and which also required an engineer, upon arriving at such a post, to blow the locomotive's whistle and to check and keep checking its speed so as to be able to stop in time if any person or thing were using the crossing. Defendant contended that the statute placed such a burden upon interstate commerce as to violate the commerce clause of the Federal Constitution, and in that connection alleged that "it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute." The court *held* that "these averments are mere conclusions," setting forth no facts which would make the operation of the statute unconstitutional. *Dis-senting* Mr. Justice Holmes said (p. 358): "These are pure allegations of fact. They mean on their face that the requirement that the engineer at every grade crossing should have his train under such control as to be able to stop if necessary to avoid running down a man or wagon crossing the track requires such delays as to prevent or seriously to interfere with com-

case in such a manner that vagueness is avoided; that an opponent may be informed of the facts which he must plead and which he must be prepared to meet upon a trial without the risk of surprise by some unforeseen construction of an obscure pleading."

⁷ The Arizona Rules of Civil Procedure "are, in substance, the new Federal Rules of Civil Procedure, modified in a few instances to suit our local conditions." [See Compiler's Note to § 21-201, Ariz. Code Ann. (1939).] And, as pointed out in the *Malin* case, in *Marston v. Denton*, 60 Ariz. 178, 134 P.2d 158, the court said a motion to dismiss an action should never be granted "unless the facts are such that under no possible theory could it be said the relief sought could be granted." In the *Malin* case the court also referred to *Leiner v. State Mutual Life Insurance Co.*, 108 F. 2d 302 (C.C.A. 8th), which is quoted from in *People v. McCloskey*, *infra* p. 247, but said "we cannot allow a federal case to prevail over the opinions of this court." The *Malin* case should be contrasted with the *McCloskey* case.

merce among the States. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement impracticable, since I can think of nothing but the number of them that would have that effect.

"The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required."

SECTION 3. ULTIMATE FACTS AND CONCLUSIONS OF LAW: MATTERS OF FACT AND MATTERS OF LAW

NOTE ON CONCLUSIONS OF LAW

We must now distinguish between propositions, which are potential or actual knowledge, and statements about matters of law, which are not knowledge. A good way to begin, is to differentiate theoretical and practical questions.

A theoretical question is one which seeks knowledge. Every theoretical question is of the form "What is the case in some respect," although it can ask what is the case in general, e.g., "Are men mortal," or in particular, e.g., "Is this a man." It follows that all that is needed to answer such a question is knowledge of what is the case in the respect about which inquiry is made, and that any one who has such knowledge can answer the question. It follows, too, that a theoretical question is answered by an act of the intellect, the assertion of a proposition, general or elementary, according as the question is general or particular.

A practical problem is one which seeks not knowledge, but a course of action. Every practical question is of the form "What *ought* to be done in some respect," although it can ask what ought to be done in general, e. g., "Ought the pleading of conclusions of law be prohibited," or in particular, e.g., "Ought this conduct be evaluated as tortious." While the possible answers to a perfect theoretical question are contradictory propositions, the possible answers to a perfect practical question are alternative courses of action. It follows that while knowledge of what is the case in one or more respects is always needed to answer a practical question, it is inadequate to answer such a

question. Since a practical question is a normative question, a norm, a rule of conduct, is also needed to answer such a question. It follows that a practical question is answered by act of the will, a decision or command or some other.

Every question about a matter of law asks what ought to be done in some respect in the government of a political society. Every such question is, therefore, a practical question. If a question about a matter of law is general, it is answered by a rule of law; if it is particular, it is answered by an elementary statement about a matter of law. It follows that only legislators and judges and other officials of a political society who are authorized to do so, can answer questions about matters of law. Lawyers and the rest of the community can only seek to influence their answers by argument or less rational means of persuasion.

The differences between elementary propositions and elementary statements about matters of law will become clearer if we compare the sentences "This thing is a man" and "This thing is a tort-feasor." Obviously, there is no difference whatever between the subjects of the two sentences. In each, the subject is a definite descriptive phrase which designates or denotes some particular, some existent entity, which is being considered. In each, the predicate is a common noun which connotes a class or kind of thing, that is, an idea or a concept. But there is an essential difference between the concepts which they signify and the intellectual processes by which such concepts are formed. The word "man" signifies an idea in the natural order, our understanding of some thing which has natural or physical existence. We form such ideas by abstracting the nature or species of things from their material conditions, and such ideas constitute a part of our knowledge of the universe. The word "tort-feasor," on the other hand, signifies an idea in the legal order. Although inexperienced men can not form legal ideas, such ideas, unlike ideas in the natural order, are not abstracted from our sensitive experience of things. They are rather constructed to serve some purpose of the legal order of which they are a part. Consequently, they are not part of our knowledge of the universe; nothing exists naturally as a tort-feasor or, to take other examples, as a fee simple absolute or as a constructive trust. There is a corresponding essential difference between the meanings of the copula "is" in the two sentences. In the sentence "This is a man" the copula means "is (actually) characterized or classified as"; in the sentence "This is a tort-feasor" it means "ought (for legal purposes) to be characterized or classified or evaluated as."

It should now be clear why an elementary proposition is, whereas an elementary statement about a matter of law is not, potential or actual knowledge, and why an elementary proposition cannot answer a question about a matter of law and an elementary statement about a matter of law cannot answer a theoretical question.

If the word or phrase used as the predicate of a sentence is a word or phrase which, like "tort-feasor," "fee simple" or "constructive trust," unambiguously signifies an idea in the legal order, the sentence will unequivocally signify either a general or elementary statement about a matter of law. And if it is a word which unambiguously connotes an idea in the natural order, the sentence will unequivocally symbolize either a general or an elementary proposition. But many, if not most, of the words and phrases used to name legal ideas are also used in popular speech to name ideas in the natural order, e.g., "assault," "larcency," "mob," "negligence," and "authority." Consequently, if the predicate of a sentence, e.g., an allegation in a pleading, is such an ambiguous word or phrase, the sentence will be ambiguous; and in order to determine whether it signifies a proposition or a statement about a matter of law it will be necessary to discover the intention with which the speaker or writer used the word, either from the context of the sentence or in some other way.

Just as there are theoretical and practical questions, so there are theoretical and practical syllogisms. The conclusions of theoretical syllogisms are propositions; a theoretical inference represents a gain in knowledge. But the conclusions of practical syllogisms are rules, commands, decisions and such like. If the conclusion of a syllogism is an elementary proposition and the inference is formally correct, its major premise will be a general proposition and its minor premise, an elementary proposition. If the conclusion of a syllogism is an elementary statement about a matter of law and the inference is a valid one, its major premise will be a rule or some other general statement about a matter of law, and its minor premise, either another elementary statement about a matter of law or an elementary proposition.

It follows that if a rule prohibiting the pleading of conclusions of law were administered according to logical criteria it would be forbidden to allege inferred elementary statements about matters of law. If the courts do not so administer the rule, they must administer it according to legal, that is, practical criteria; and in that event it must be permissible to allege some but not other conclusions of law. On the basis of the following

cases, you should therefore attempt to answer the following questions:

1. Do the courts administer the rule forbidding the pleading of conclusions of law according to logical criteria and, if not, how do they distinguish between those conclusions of law which may, and those which may not, be pleaded?
2. If a complaint alleges a conclusion of law which may not be alleged, is it substantively or only formally defective? By what procedural devices may and should a defendant be permitted to attack a complaint as defective in that respect?
3. Should a litigant be forbidden or permitted to allege what according to legal criteria are conclusions of law, and for what reasons?

SHAKE v. BOARD OF COMMISSIONERS OF SULLIVAN COUNTY

Supreme Court of Indiana, 1936. 210 Ind. 61, 1 N.E.2d 132.

FANSLER, J. In each case under consideration appellant sued for personal injuries resulting from an assault and battery committed upon him by five or more persons because of his having entered into the employment of a certain coal mining company during a strike. It is the theory of the appellants that the county is liable for injuries received under such circumstances, under chapter 85 of the Acts of 1931, p. 245, since repealed.

Demurrers to the complaints were sustained,¹ and this ruling is the basis of the error assigned.

There was no right of action against municipalities for injury resulting from lynching or other mob violence at common law, and therefore recovery, if at all, must be under the statute. Statutes creating rights not given by the common law are strictly construed, and one seeking relief thereunder must bring himself clearly within the terms of the statute. The statute penalizes the municipality for the unlawful conduct of individuals within its borders, and the reasons which require that statutes providing for penalties and forfeitures must be strictly construed are applicable.

The title of the act relied upon is as follows: "An act concerning lynching, providing for the removal and reinstatement of county sheriffs having the custody of persons lynched, au-

¹ Were these demurrers based upon substantive or upon formal or procedural grounds or upon both?

thorizing the maintenance of actions for damages sustained as the result thereof, and prescribing penalties for inflicting damage or injury on others in certain cases without authority of law." . . . Sections 5 and 7 are as follows:

"Sec. 5. Any person who is assaulted and lynched by a mob and who is injured but does not suffer death may have an action against the county where such injury occurs and may recover a determinate sum not to exceed ten thousand dollars."

"Sec. 7. That any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person or persons by violence, and without lawful authority, shall be regarded and designated by a 'mob' or 'riotous assemblage.'"

Chapter 169 of the Acts of 1905, p. 584, § 440, p. 685, which is still in force, defines a mob and the crime of lynching as follows: "any number of persons assembled for any unlawful purpose and intending to injure any person by violence and without authority of law shall be regarded as a mob, and any act of violence exercised by such mob upon the body of any person shall when such act results in the death of the injured person, constitute the crime of lynching; . . ."

Under the act of 1905, a group of persons intending injury by violence is a mob, regardless of the purpose or motive prompting the violence. But, by section 7 of the law under consideration, a mob is limited to a group of persons offering violence because of a supposed violation of the law, or for the purpose of exercising correctional or regulative powers. Recovery in these cases is limited to injury by a mob as defined in section 7.

The complaints recite that certain individuals, more than five in number, assembled for the unlawful purpose of offering violence to the person of the plaintiffs, and for the purpose of exercising correctional powers by violence, without lawful authority, over and upon the person of the plaintiffs, and that the assemblage of persons was a mob and riotous assemblage. But these are mere conclusions, and we must look to the allegations of fact to determine whether or not the plaintiffs come within the provisions of the statute. The facts alleged show that recovery is sought for injuries resulting from an assault and battery by a collection of persons, more than five in number, assembled for the purpose of offering violence to plaintiffs because of the fact that plaintiffs worked for a coal mining company which did not pay a certain rate of wages. It is clear that violence was not done the plaintiffs for the reason that they were supposed to

have been guilty of a violation of the law. Was the violence then "for the purpose of exercising correctional powers or regulative powers . . . and without lawful authority?" The plaintiffs were assaulted and injured because they chose to work at the mine, which they had a lawful right to do, and which was not contrary to any rule, order, code, or regulation which they were bound to obey. There was a mere difference of opinion between the attackers and the attacked. A group of more than five persons might offer violence to and injure some person because of a feud, or a disagreement over a line fence, or the use of a spring of water, or the right to make social calls in a neighborhood. All such violence could be said to be the violence of a mob as defined in the act of 1905, but since language is used in the act under consideration evidencing a clear intention to limit the definition existing upon the statute books, we cannot construe the present act as intended to cover everything within the former definition. If "regulative" refers to something other than regulating to the will of the party offering violence, and if "correctional" means something other than enforcing a change of conduct in conformance to that will, they must have reference to correction in respect to some established law or rule of conduct, and regulation in respect thereto. "Correctional" is defined by Webster's New International Dictionary as "designating, or pertaining to, the courts which punish delinquents, esp. minors, by detention in a house of correction, or, loosely, those that have a corrective jurisdiction over petty offenses." Among the definitions of "correction" is "act of reproving or punishing for faults or for deviation from moral rectitude." "Regulation" is defined as "a rule or order prescribed for management or government; a regulating principle; a governing direction, precept, or law; as, the regulations of a society or a school." There may be other obscure and less generally recognized meanings, but, in their generally accepted sense, correctional powers and regulative powers are considered as those vested in some established authority. Established authority implies lawful power, and in this view and meaning of the language, the section must refer to violence offered for the purpose of exercising correctional and regulative powers vested by law in the government, for we cannot conceive of the Legislature taking cognizance of other rule or law-making authority.

Since recourse to mob violence may be prompted by failure of public officers to enforce the law and exercise the correctional or regulative powers vested in them with respect to individual conduct, there may be some basis in reason and justice for penalizing a municipality and its taxpayers for injuries resulting from such violence. The responsibility for electing efficient pub-

lic officers is in the local community. There would seem to be far less reason and justice in penalizing the municipality and its taxpayers for injuries resulting from private disagreements about matters or conduct concerning which the public has not assumed power or authority to make rules or regulations. The language of section 7 must be treated as manifesting an intention that municipalities shall be liable only for injuries inflicted by a mob as therein defined. A mob, as defined in the act of 1905, is any group of persons who inflict an injury by violence without regard to the reason for the violence, while in section 7 it is limited to groups of five or more offering violence because of a supposed violation of the law, or for the purpose of exercising correctional or regulative powers. These terms must be interpreted as limiting liability to injuries inflicted by groups of five or more persons who have unlawfully usurped and assumed power to regulate and correct individuals in respect to those matters concerning which the public has assumed jurisdiction to make laws, rules, and regulations. There seems to be no other natural and logical line of demarcation between unlawful violence generally, as described in the act of 1905, and violence as limited by the language of section 7.

The complaints do not bring the cases within the terms of the statute. The demurrers were properly sustained.

Judgment affirmed.² . . .

TREANOR, J., dissenting. I cannot agree that the terms of § 7 . . . must be interpreted as "limiting liability to injuries inflicted by groups of five or more persons who have unlawfully usurped and assumed power to regulate and correct individuals in respect to those matters concerning which the public has assumed jurisdiction to make laws, rules and regulations." I do not believe that the exercising of "correctional powers or regulative powers over any person or persons by violence" includes only acts of violence engaged in for the purpose of compelling persons to conform to the law of the state. I think that it includes the use of violence by a mob or riotous assemblage for the purpose of compelling other persons to conform to the ideas and standards of conduct of the persons using the violence even though the ideas and standards may be contrary to the law of the state. The evil aimed at in these statutes is the substitution of the exercise of irresponsible power of private individuals for the orderly exercise of power by the state.

² Cf. *M. Carpenter Baking Co. v. Department of Agriculture and Markets*, 217 Wis. 196, 257 N.W. 606 (1934).

HOARD v. GILBERT

Supreme Court of Wisconsin, 1931. 205 Wis. 557, 238 N.W. 371.

NELSON, J. This is an appeal from an order of the circuit court for Dodge county overruling the defendant's demurrer to the plaintiff's complaint.

The complaint, omitting its formal parts, consists of but a single paragraph and is as follows:

"1. That since the 16th day of April, 1927, and prior to the 21st day of June, 1930, said defendant was indebted to one Josephine Dittburner in the sum of six thousand dollars for the support and maintenance of his infant son, James Leroy Gilbert, for the period of fifteen years from the 16th day of April, 1912, to said 16th day of April, 1927; that on the 21st day of June, 1930, said Josephine Dittburner, for a valuable consideration, duly assigned said claim and all right of action thereon, and plaintiff is now the owner and holder thereof, and there is now due and owing to said plaintiff from said defendant the sum of six thousand dollars on said account."

The defendant demurred to the complaint on the ground that it appears upon its face that it does not state facts sufficient to constitute a cause of action.¹ The court below held that the complaint stated a cause of action and entered an order overruling the demurrer, with leave to answer on terms.

The defendant contends that the action of the court below in overruling his demurrer was error.

The defendant, among other things, contends that the complaint fails to state a cause of action because it is not alleged therein that defendant's infant son was supported at the request of the defendant or with his knowledge and consent, or that, knowing of such support, he assented thereto, and that no notice to the defendant of the assignment by Josephine Dittburner is pleaded.

Sec. 263.03, Stats., provides that the complaint shall contain "(2) A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition." It is, of course, elementary that a court, in determining whether a complaint states a cause of action, must give to its several allegations a liberal construction. Sec. 263.27, Stats. But it is also elementary that a court cannot supply essential allegations which are omitted or lacking in a pleading.

¹ Was this demurrer based upon substantive or upon formal or procedural grounds or upon both?

A reading of the complaint clearly reveals that the pleader did not attempt to state a cause of action based upon express contract. Did he intend to state a cause of action based upon implied contract? Viewing the complaint in the latter light and giving it a liberal construction as we must do, does it contain a plain and concise statement of facts constituting a cause of action? The answer to this question must rest upon a consideration of the law relating to the liability of a parent for the support of his infant child.² . . .

It appears from a consideration of these cases that liability of a parent for the support of his infant child, in the absence of an express promise to pay therefor, may be predicated upon (1) facts showing that the infant has been forced out into the world by the cruelty, neglect, or improper conduct of the father; (2) facts showing that a parent, with full knowledge of the facts and without objection thereto, approved of the furnishing of support to his infant child; and (3) facts showing that the parent has permitted a stranger to maintain, support, and instruct his infant child, in no way objecting to the act but rather assenting thereto and advising therein.

It is very apparent that the complaint herein is fatally defective in failing to allege either an express promise to pay a definite amount for the support furnished or the reasonable value thereof; or in failing to allege facts such as knowledge of and assent to the furnishing of such support; or facts tending to show cruelty, neglect, or other improper conduct on the part of the parent from which an agreement to pay the reasonable value of such support may be implied by law. The only allegation of the complaint that may be suggested as curing its otherwise obvious shortcomings is the allegation "that since the 16th day of April, 1927, and prior to the 21st day of June, 1930, said defendant was indebted to one Josephine Dittburner in the sum of six thousand dollars for the support and maintenance of his infant son." In no reasonable construction of this language, however, can we spell out of it the allegation of facts necessary to a cause of action of this nature. The allegation that "said defendant was indebted" to plaintiff's assignor is nothing more nor less than a conclusion of law. 49 Corp. Jur. p. 49, § 20; *Williams v. Brunson*, 41 Wis. 418; *State v. Egerer*, 55 Wis. 527, 13 N. W. 461. See, also, 49 Corp. Jur. (Pleading), p. 46, § 18, where it is said: "A pleading which depends on conclusions of law, without stating the facts on which they are based, is fatally defective. In other words, a conclusion of law cannot obviate the

² At this point the court discussed prior Wisconsin cases involving the question of the liability of a father for the support of his infant child.

necessity of setting out essential facts." (Citing numerous authorities.) The allegations above quoted cannot supply or operate to supply the necessary but omitted allegations of essential facts showing a cause of action in favor of one who has rendered support to an infant child of another.

Having reached the conclusion that the complaint fails to state a cause of action, it becomes unnecessary for us to consider the other contentions of the appellant.

By the Court. Order reversed, with directions to enter an order sustaining the demurrer to the complaint herein.

NOTES

(1) *Desautel v. North Dakota Workmen's Compensation Bureau*, 72 N. D. 35, 36-37, 4 N. W. 2d 581 (1942): "The demurrer admits the truth of well pleaded facts and those presumed or reasonably or necessarily inferred from the facts alleged in the complaint. . . . Conclusions of law in the absence of allegations of fact to support them are not admitted by demurrer. . . . The statement in the complaint that the accident occurred in the course of plaintiff's employment is a conclusion that is not admitted by the demurrer. It is the point in controversy upon which the sufficiency of the complaint must be determined. If facts pleaded are sufficient to show that the plaintiff was injured in the course of her employment, the complaint states a cause of action. If such facts are not stated, the complaint is fatally defective. An injury to be compensable under the North Dakota Workmen's Compensation Law, chapter 286, Session Laws N. D. 1935, must arise in the course of employment."¹

(2) *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491 (1888): Plaintiff alleged that defendants did "unlawfully, and without right or cause, with force and arms set upon and assault him, while under arrest, and did thereby put him in great fear, and heap upon him great shame and indignity, and other injuries then and there did him, whereby he was damaged in the sum of fifty thousand dollars." Judgment sustaining a demurrer to the petition *affirmed*. (1) "The term 'assault' has a legal meaning, as much so as the word 'trespass.' It has been defined to be 'an inchoate violence to the person of another, with the present means of carrying the intent into effect;' or 'an unlawful setting upon one's person;' or 'an unlawful offer or attempt with force or violence to do a corporal hurt to another.' It may be committed in very many ways; as to present a gun or other weapon in a threatening manner within harming distance; to ride after one, compelling him to flee to avoid injury; to throw a harmful missile at another with intent to injure, even if it misses him; or advance in a threatening manner to strike one so that the blow will be received in a few seconds, if the assaulting party be not stopped. Instances almost without

¹ Cf. *Shank v. Industrial Commission of Ohio*, 72 Ohio App. 535, 51 N.E. 2d 535 (1942).

number might be given." (ii) "The term as used in a pleading has its legal meaning;² it is actionable in its legal sense only; and how is a court to determine upon a demurrer to the petition whether the complainant has been assaulted, unless he states the facts. The *ipse dixit* of the pleader to this effect will not answer, because this would make him the judge of the law instead of the court. Whether the acts of a party authorize the legal conclusion that he has committed an assault is to be determined by the court, and it cannot do so unless they are stated." (iii) "If it can be fairly claimed that the word 'assaulted,' when used in a pleading, amounts to a statement of both a fact and a legal conclusion, yet it is not such a statement of facts as will enable the court to determine whether the party charged has, by his acts, committed what is in law an assault."

RANNARD v. LOCKHEED AIRCRAFT CORPORATION

Supreme Court of California, 1945. 26 Cal. 2d 149, 157 P. 2d 1.

SPENCE, JUSTICE. Plaintiffs, who are husband and wife, have appealed from a judgment on the pleadings which was rendered in response to a motion made by defendant Lockheed Aircraft Corporation at the commencement of the trial after an objection to plaintiffs' introduction of any evidence had been sustained. . . .

In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted.

. . .

The action is for damages for the alleged malpractice of one Z. P. King, a physician and surgeon, who, it is averred, was in the employ of defendant Lockheed Aircraft Corporation for the purpose of giving physical examinations to persons who applied to said corporation for employment and of rendering certain other professional services. The medical treatment here in question was rendered to the plaintiff husband, H. H. Rannard, and not to the wife. The complaint contains five separate statements of fact, each designated as a cause of action, which, so far as here material, may be summarized as follows:

[The first cause of action alleged, in addition to the allegations with respect to the relationship between Lockheed and

² What is the justification for this statement. The word "assault" also has a popular meaning, and is a word in common use. The Shorter Oxford English Dictionary thus defines the verb "to assault": "To make a violent hostile attack by physical means upon; to commit an assault upon the person of." And it defines the noun as "an onset with hostile intent; an attack with blows or weapons."

King, that Rannard applied to Lockheed for employment and was accepted subject to a physical examination by King; that King "conducted such physical examination negligently, carelessly and unskillfully"; and that, as a proximate result of such negligence, Rannard sustained certain injuries. The second cause of action incorporated the allegations of the first and also alleged that in employing King to conduct such physical examinations Lockheed "negligently failed" to employ a physician capable of exercising that degree of care and skill possessed by physicians practicing in the locality of the Lockheed plant. The third cause of action incorporated the allegations of the first and also alleged that Rannard was "negligently, carelessly and unskillfully advised by" King that it would be necessary for him to submit to a surgical operation and that King performed the operation in a "negligent, careless and unskillful manner." "The fourth cause of action is against defendant King only and was held sufficient to state a cause of action against him." The fifth cause of action incorporated the allegations of the first and third and also alleged that after the operation King continued to treat Rannard and "that he did so negligently."]

Defendants answered separately without demurring to the complaint. . . .

Under the authorities, it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff.¹ . . . The rule was early announced in this state in *Stephenson v. Southern Pacific Co.*, 1894, 102 Cal. 143, 147, 148, 34 P. 618, 619, 36 P. 407, as follows: "In adopting what is known as the 'code system of pleading,' courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that 'no greater particularity is required than the nature of the thing pleaded will conveniently admit,' (Steph. Pl. *367;) supported by that other rule that 'less particularity is required when the facts lie more in the knowledge of the opposite party,' (Id., *370.) In cases of negligence, the sufferer may only know the general, the immediate, cause of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. . . . The term 'negligence,' for the purpose of pleading, is a fact to be

¹ Citations of prior California decisions to that effect are omitted.

pleaded,—an ultimate fact, which qualifies an act otherwise not wrongful.² Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong. The absence of care in doing an act which produces injury to another, is actionable. The term 'negligence' signifies and stands for the absence of care. . . . As a result of the application of these principles to code pleading in cases of negligence, and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done."

This elementary principle of negligence pleading has been followed in a variety of situations in this state. Thus, in cases involving automobiles or other vehicles, it is sufficient to aver that defendant negligently operated the vehicle without alleging how or in what respect it was done. A typical example is found in *Stein v. United Railroads*, 159 Cal. 368, 370, 113 P. 663, 664, where it was alleged merely that the defendant "operated, ran, and conducted one of its cars . . . in such a careless, negligent, reckless, wrongful, and unlawful manner that the said car . . . ran into and upon the plaintiff and severely injured the plaintiff," and the complaint was held sufficient. Other illustrations of general negligence, pleading involving varying factual backgrounds may be found in *Fisher v. Western Fuse and Explosives Co.*, 12 Cal. App. 739, 108 P. 659 (explosion of a powder mill); *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 P. 954 (falling elevator); and *Ingalls v. Monte Cristo Oil & Development Co.*, 176 Cal. 128, 167 P. 857 (defective construction of roof).

The same rule permitting the pleading of negligence in general terms has been applied in malpractice cases. *Dunn v. Dufficy*, 194 Cal. 383, 228 P. 1029; *Ragin v. Zimmerman*, 206 Cal. 723, 276 P. 107; *McGehee v. Schiffman*, 4 Cal. App. 50, 87 P. 290. That in such instances, in addition to general allegations of negligence, the complaint may include a recital of certain related particulars does not deflect from the force of the general rule

² *Reconstruction Finance Corporation v. Lucius*, 320 Ill. App. 57, 71-72, 49 N.E.2d 852 (1943): "As to defendants' criticism that the allegation that the notes sued upon were notes given pursuant to the agreement is not an averment of fact but a conclusion of the pleader, we observe that many allegations commonly made and yet accepted as proper pleadings are stated in the form of conclusions. The concepts 'ownership', 'possession', 'promised', 'committed an assault', 'negligently', 'fraudulently', 'did perform said promise', 'holder', etc., are deemed to be ultimate facts and are pleadable in the above language, yet elements of legal conclusions are involved in every one of them. What is law, what are facts and what is evidence for pleading purposes, can be determined only by a court's consideration of the practical task of administering a particular litigation. We are satisfied that the allegation that the notes sued upon were notes given pursuant to the agreement, although in the nature of a conclusion of fact, was proper pleading."

that "it is sufficient in cases of this class to plead that the thing done was negligently done." *Ragin v. Zimmerman*, supra, 206 Cal. at page 725, 276 P. at page 108; cf. *Blakeslee v. Tannlund*, 25 Cal. App. 2d 32, 76 P. 2d 216. While the statement of other facts auxiliary to the main fact—"the fact which caused the injury" (*McGehee v. Schiffman*, supra, 4 Cal. App. at page 53, 87 P. at page 291)—might tend to provide a clearer conception of the principal act, it has been the settled rule in this state since the decision of *Stephenson v. Southern Pacific Co.*, supra, that "negligence and proximate cause may be simply set forth." *Roberts v. Griffith Co.*, 100 Cal. App. 456, 461, 280 P. 199, 201. The application of this rule to pleadings in malpractice cases is well stated in *Abor v. Martyn*, 31 Cal. App. 2d 705, 707, 708, 88 P. 2d 797, 798, as follows: "It sufficiently appears from this complaint that what was done by this defendant was the administration of chiropractic treatments, which treatments, it was alleged, were negligently administered. Having alleged what was done and that the same was negligently done, the complaint was sufficient in the absence of a demurrer. While the defendant might have insisted upon greater certainty and particularity, he waived such defects by failure to interpose a special demurrer. As against a general demurrer, which is what an objection to the introduction of any evidence amounts to, the complaint is sufficient."

Tested by the requirements of the established rule for negligence pleading, the complaint in the present case must be held sufficient. Negligence is expressly alleged with respect to three successive stages in the medical services rendered to plaintiff H. H. Rannard: the diagnosis, the operation, and the subsequent treatment. In relation to this premise of negligence, the complaint further alleges that "as a direct and proximate consequence and result" thereof various items of damage had been sustained by plaintiffs, thus satisfying the requirement of pleading "a causal connection between the act and the injury." 19 Cal. Jur., "Negligence," § 101, pp. 677, 678. While the complaint is couched in very general language, "All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of his cause of action." *Dunn v. Dufficy*, supra, 194 Cal. at page 391, 228 P. at page 1032.

This the complaint here does and it should be no more necessary, after the general charge of negligence in the diagnosis, the operation and the subsequent treatment, to detail the specific

act or omission upon which plaintiffs rely than it is incumbent upon a plaintiff in an automobile collision case to specify the particular in which the vehicle was negligently operated, such as driving on the wrong side of the road, driving at an excessive speed, or failure to give proper traffic signals. These are matters of evidence which may be shown under the scope of the general negligence charge. *Taylor v. Oakland Scavenger Co.*, 12 Cal. 2d 310, 316, 317, 83 P. 2d 948.

The standard of pleading in negligence cases rests upon considerations of fairness and convenience in view of the situation of the opposing parties, and the rule permitting the pleading of negligence in general terms finds justification in the fact that the person charged with negligence may ordinarily be assumed to possess at least equal, if not superior, knowledge of the affair to that possessed by the injured party. *Stephenson v. Southern Pacific Co.*, *supra*. There are certain cases, such as *Lang v. Lilley & Thurston Co.*, 20 Cal. App. 264, 128 P. 1031, and *McAllister v. Brown*, 114 Cal. App. 239, 299 P. 753, which appear to require a high degree of particularity in the pleading of negligence. While those cases may be distinguishable upon the ground that the complaint in each instance was attacked by special as well as general demurrer, certain language in the opinions appears to be out of harmony with the liberal rule of pleading set forth in the authorities hereinbefore cited. To the extent that such language may be in conflict with the conclusions reached herein, such language is disapproved. Under the authorities hereinbefore cited, the complaint in the present case appears sufficient in its statement of a cause of action for malpractice. . . .

It follows from the above observations that the complaint here is a sufficient pleading of a cause of action against defendant Lockheed Aircraft Corporation.

The appeal from the order denying plaintiffs' motion for a new trial is dismissed. The judgment is reversed.³

NOTES

(1) Before appealing to the Supreme Court Mr. and Mrs. Rannard had appealed to the District Court of Appeal and that court had affirmed the judgment of the trial court. See *Rannard v. Lockheed Aircraft Corporation*, 150 P. 2d 255 (Cal. App. 1944). In the course of its opinion the Court of Appeal *said* (150 P. 2d 257): "A complaint must state the facts which constitute the plaintiff's cause of action; mere conclusions which

³ Cf. *Guilliams v. Hollywood Hospital*, 18 Cal. App. 2d 97, 114 P.2d 1 (1941); *Gormon v. Murphy Diesel Engine Co.*, 3 Terry 149, 29 A.2d 145 (Del. 1942).

do not give even a clue as to the facts which the defendant will be called upon to meet are not sufficient. A complaint against a surgeon which alleges that he operated upon the plaintiff carelessly and unskillfully, and that as the proximate result of the negligence the plaintiff has been disabled and has lost the ability to work, does not state a cause of action. There must be a factual statement as to what the defendant did or failed to do and as to the connection between the alleged negligence and the alleged results of it in the pleading as well as in the proof. If a man should sue another, alleging that he had been rendered an invalid by the negligent firing of a gun, or the driving of an automobile, the defendant would be entitled to know whether he was charged with having struck the plaintiff or only frightened him."

(2) Va. Code Ann. § 6118 (1942) provides that a demurrer to a declaration alleging negligence of defendant shall not be sustained "because the particulars of the negligence are not stated, but such particulars may be demanded by the defendant under section six thousand and ninety-one," which provides that in any action the court may order a statement to be filed of the particulars of the claim or of the ground of defense and, if a party fails to comply with such order, may upon the trial of the case exclude evidence of any matter not described in the declaration or other pleading so plainly as to give the adverse party notice of its character. In the annotations to section 6118 it is stated: "Under the decisions of the Supreme Court of Appeals a declaration containing general averments of negligence is bad on demurrer; greater particularity being required. Manifestly, the particulars of the negligence should be stated in the declaration, as it is information to which the defendant is clearly entitled; but it occurred to the revisors that it would expedite matters and be in the interest of substantial justice to provide that a demurrer shall not be sustained to a declaration because the particulars of the negligence are not stated, but that the particulars may be demanded by the defendant under the section concerning bills of particulars generally."

(3) *Thayer v. Gile*, 42 Hun 268 (N. Y. Sup. Ct., App. Div., 1886): Plaintiff alleged that as tenant in common with defendant he was in possession of certain hay which defendant converted to his own use to plaintiff's damage, etc. Judgment sustaining a demurrer to the complaint *reversed*. (i) "It is still good pleading to state facts according to their legal effect, unless the pleader so narrates the facts as to show that he has mistaken their legal effect. . . . Thus, it was not necessary for the plaintiff to allege the details from which her tenancy in common,¹ or possession, or the conversion by the defendant would follow as their legal effect. These details are rather in the nature of the evidence, to be adduced upon the trial to support these three allegations." (ii) "By using the word 'converted' the plaintiff has concisely condensed in a single word the notice to the defendant that whatever it may be necessary to prove

¹ But see *Myerberg v. Hall*, 162 Md. 578, 160 A. 621 (1932).

she intends to prove it.”⁵ (iii) “A converted B’s hay is a fact; A’s liability to B, the law.” The statement of the conversion “is the statement of a fact, ascertained by the rules of law.”

(4) *McCaughey v. Schuette*, 117 Cal. 223, 46 P. 665 (1897): In an action of ejectment plaintiff alleged that to secure the payment of a promissory note which defendants had given plaintiff they executed a mortgage upon certain land; that subsequently plaintiff and defendants entered into an agreement whereby defendants agreed to convey the land to plaintiff and plaintiff agreed to take it in full payment of the note and to cancel the mortgage; that thereafter defendants delivered a deed to the land to plaintiff and plaintiff surrendered the note and discharged the mortgage of record; but that defendants refused to deliver possession of the land to plaintiff. *Held*, the trial judge should have sustained defendants’ demurrer. (i) The complaint is argumentative. It contains “no averment of seisin, or ownership, or possession, or right of possession, to the demanded premises, but the pleader contents himself with a statement of evidentiary facts which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff.” (ii) “To uphold such a pleading is to encourage prolixity and a wide departure from that definiteness, certainty and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect except to encumber the record with verbiage and enhance the cost of litigation.”

(5) *Clark v. Chicago, Milwaukee & St. Paul Railway Co.*, 28 Minn. 69, 9 N. W. 75 (1881): “It is urged that it is not sufficient to allege that an act was done negligently or carelessly; that this is merely a conclusion of law, and not a statement of an issuable fact; that the physical facts constituting the negligence must be alleged. It is, of course, an elementary rule of pleading that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact, unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law, and in part statements of fact, or rather the ultimate facts drawn from these probative or evidential facts not stated; yet these forms are universally held to be good pleading. Some latitude must therefore be given to the term ‘facts,’ when used in a rule of pleading. It must of necessity include many allegations which are mixed conclusions of law and statements of fact; otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence, it has become a rule of pleading that, while it is not allowable to allege a mere conclusion of law con-

⁵ Cf. *Mining Securities Co. v. Wall*, 99 Mont. 596, 602, 45 P.2d 302 (1935): “A fuller statement of the fact may be preferable, but excessive particularity is not required in the statement of the manner in which a wrong was committed, as the defendant is presumptively better informed of the facts than the adverse party, and the general rule of pleading applies that less particularity is required where the facts lie more in the knowledge of the opposite party than of the party pleading.”

taining no element of fact, yet it is proper, not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of fact and of a legal conclusion.⁶ It may not be possible to formulate a definition that will always describe what is a mere conclusion of law so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is undoubtedly true that there will be found a want of entire judicial harmony in the adjudicated cases as to what are statements of fact, and what are mere conclusions of law. And in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle. But it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact; that when we speak of an act as negligent or careless, according to the common use of language, we state, not simply a conclusion of law, but likewise state an ultimate fact, inferable from certain other facts not stated."⁷

(6) *Mining Securities Co. v. Wall*, 99 Mont. 596, 602-603, 45 P. 2d 302 (1935): "The question here presented is as to whether the declaration that the checks mentioned were 'unauthorized' is a conclusion of law or the statement of an ultimate fact, and, in this connection, it must be remembered that the complaint is challenged only by a general demurrer. . . . The line of demarcation between what are statements of fact and what conclusions of law is not one easy to be drawn in all cases; the same averment may be of a fact or a conclusion of law, according to the context. Generally, however, ultimate facts are but the logical conclusions deduced from certain primary facts, evidentiary in their character, while conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence, and, usually, the means by which the result is to be reached, determine whether a given conclusion is one of fact or of law. (1 Bancroft on Code Pleading, 93-95.) For example: An allegation of 'fraud' states merely a conclusion of law, for it does not indicate evidentiary facts from which it may be deduced; it is merely an epithet applied to the acts of the person accused without any indication of what those acts were. (*Fox v. Hale & Norcross Silver Min. Co.*, 5 Cal. Unrep. 980, 53 P. 32, 36, 169.) The use of the term gives no intimation as to the facts from which 'fraud' may be deduced. On the other hand, to say that an act was 'unauthorized' conveys

⁶ Judged by logical criteria, is not every elementary statement about a matter of law "the statement of a fact according to its legal effect" (*Thayer v. Gile, supra*) or "a mixed statement of a fact and of a legal conclusion"?

⁷ Cf. *Marshall v. Wittig*, 210 Wis. 510, 238 N.W. 390 (1931), in which allegations that a certain corporation was dissolved and that its assets and, in particular, a certain note, belonged to its stockholders, were held sufficient, as against a general demurrer, as allegations of "matters of mixed law and fact" which "for the purpose of pleading, are treated as facts, and examples of which are not infrequent, especially where the title or ownership of property is alleged."

the information, not only to the lawyer, but to the layman, that the actor was not authorized to do the act; acted without authorization. (See Merriam-Webster New Int. Dictionary, 2d ed.; *Ankeny v. Rawhouser*, 2 Neb. (Unof.) 32, 95 N. W. 1053.) Here no resort to legal definitions is necessary in order to arrive at the conclusion that the party charged with wrongfully issuing the checks had no authority from the proper officers of the corporation plaintiff to issue such checks,⁸ and, consequently, the charge that the checks were 'unauthorized' states an ultimate fact and not a conclusion of law. Ordinarily, it is only necessary to plead the ultimate facts; the evidentiary facts tending to show the ultimate facts being matters of proof."

(7) In *Re Morrow's Will*, 41 N. M. 723, 738, 742-743, 73 P. 2d 1360 (1937): Proceedings to contest the will of Mary J. Morrow, which had been admitted to probate. A statute of the state provides that "any person interested" may contest a will within a year after it is probated. Petitioners were "persons interested" only if no child or descendant of a child and neither parent of Thomas E. Morrow, who was the husband of the testatrix and who predeceased her, were living at the time of her death. The petition was silent in that regard; it alleged only that petitioners were the nephews and nieces of Thomas E. Morrow by blood and of the testatrix as the result of her marriage to their uncle, and that they were her heirs at law and, as such, persons interested in her estate. *Held*, the demurrer to the petition should have been overruled. (i) "The petition is incomplete in the particulars mentioned, but such facts may be inferred from the fact that it is alleged that petitioners are 'heirs at law' and 'interested in the estate'; and could not be in the sense of the statute, if there had been children or descendants of children of Thomas E. Morrow, or if his father or mother had been alive.

Standing alone these would be conclusions . . . , but in connection with the allegations of fact we have mentioned⁹ it may be inferred that Thomas Morrow and Mary J. Morrow died without living children or descendants of deceased children and that Thomas Morrow's parents predeceased her; for only in such case could they be heirs at law of Mary J. Morrow, deceased, or be interested in the estate by reason of the relationship alleged." (ii) "It is certain that mere allegations of conclusions of law state no cause of action or defense; that facts must be stated, and those facts must be such that they will constitute a cause of action. But those facts may be incomplete, stated imperfectly or defectively; yet will be sufficient as against a general demurrer, if a cause of action can be inferred from the matters stated, though some clarification or insufficiency is supplied by a conclusion, either of law or fact."¹⁰

⁸ Cf. Restatement, Agency § 7 (1933): "Authority is the power of the agent to effect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."

⁹ These allegations concerned the relationships of petitioners to Thomas E. and Mary J. Morrow.

¹⁰ Cf. *Mining Securities Co. v. Wall*, 99 Mont. 596, 602, 45 P.2d 302 (1935): "[U]nder certain circumstances the allegation of that which is usually regarded as a legal conclusion may supply the want of a material fact, so as to render the complaint immune from attack by general demurrer."

(iii) "It is held that a general allegation of heirship standing alone is a conclusion of law (see annotations 110 A. L. R. 1239), but it is also held to be a conclusion of fact; and in connection with facts showing necessary relationship, it is sufficient as against a demurrer, whether a conclusion of law or fact."¹¹

(8) *Oliver v. Coffman*, 112 Ind. App. 507, 45 N. E. 2d 351 (1942): (i) The statute [Ind. Stat. Ann. (Burns, 1933) § 2-1005] provides that all conclusions stated in pleadings "shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency" thereof, and that the only remedy "against such conclusions" shall be a motion requiring the pleader "to state the facts necessary to sustain the conclusion alleged."¹² But the statute is applicable only to conclusions of fact. (ii) "This is confusing to the pleader, and to the trial court when it is required to rule upon motions to strike out or make more specific." It is confusing because of the difficulty of distinguishing between an "ultimate issuable fact" and a "conclusion of fact," which are "quite often indistinguishable." "An ultimate fact is the final or resultant fact that has been reached, by the processes of logical reasoning, from the detailed or probative facts. 41 Am. Jur., Pleading, § 7, p. 292." But a conclusion of fact is also a conclusion "reached by reasoning from detailed or probative facts." Moreover, while the rule is that ultimate and not evidentiary facts should be stated in a pleading, by virtue of the statute and judicial decisions "the pleader may be required to state the facts necessary to sustain the conclusion alleged." The rule is also that conclusions of law should not be pleaded and yet they are pleadable in certain cases, and it is permissible to plead anything which according to the common use of language amounts to a mixed statement of fact and of a legal conclusion. An allegation of negligence is such. Then, too, the line of demarcation between "ultimate facts" or "conclusions of fact" and "conclusions of law" is often quite indistinct. "Sometimes an allegation [such as an allegation of ownership of specific property] which would ordinarily be regarded as an allegation of fact will be regarded as a legal conclusion when based upon other allegations." So, if a motion is made to strike an allegation from a pleading on the ground that it states a legal conclusion, the motion should be denied when any doubt exists as to the nature of the allegation. (iii) The allegations of negligence in this case were allegations of ultimate facts and, hence, defendant's motion to strike them out was properly denied. (iv) Nor did the trial court err in denying defendant's motion to make the complaint more specific by requiring plaintiff to state facts showing that a speed of 40 miles an hour was negligent at the time and place of the accident. The allegation in ques-

¹¹ Cf. *Smith v. Bentson*, 127 Cal. App. Supp. 789, 15 P.2d 910 (App. Dep't, Super. Ct., 1932); *Cannon v. Miller*, 22 Wash. 2d 227, 155 P.2d 500 (1945).

¹² Cf. Rule 45 (b), Tex. R. Civ. P., 136 Tex. 459: "Pleadings in the district and county courts shall . . .

"(b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole."

tion, when considered with the other allegations of the complaint, furnished defendant with sufficient information regarding plaintiff's claim to enable him adequately to prepare and present his case. A motion to make an allegation more specific should be tested by considering whether it is sufficiently definite to enable the adverse party intelligently to prepare his responsive pleadings and with certainty to prepare the case for trial, and not by trying to determine whether the allegation states a conclusion of fact or law or an ultimate fact. Such a motion does not lie when it seeks to compel the pleading of facts which are either evidentiary or peculiarly within the knowledge of the movant.

KELLEY v. KELLEY

Court of Appeals of Ohio, 1944. 74 Ohio App. 225, 57 N.E.2d 791.

GEIGER, J. This is an appeal from the decision of the Court of Common Pleas of Franklin county, Ohio, in a divorce case.

The assignment of errors is to the effect that the judgment entered by the Court of Common Pleas of Franklin county, Ohio, Division of Domestic Relations, on the 1st day of December, 1943, is erroneous and against the just rights of this defendant in the following respects:

- (1) The judgment of the court is contrary to law.
- (2) The judgment of the court should have sustained the demurrer of the defendant. . . .

The entry is as follows:

"This cause came on to be heard upon the demurrer of the defendant to the petition of the plaintiff, was argued by counsel and submitted to the court; on consideration whereof the court finds said demurrer not to be well taken and overrules the same. Exceptions by the defendant. Leave is granted to the defendant to plead within ten days."

The petition which gives rise to the questions here presented is that of Ethel M. Kelley against Edward R. Kelley. The petition makes the usual formal allegations and continues:

"The defendant has been guilty of gross neglect of duty and of extreme cruelty toward plaintiff, and this has continued for many years, last past, all of which will be made to appear on a trial of the merits. As the result of the conduct of the defendant, plaintiff has become a nervous wreck, and living with him has become unbearable."

To this petition a demurrer was filed on the grounds that the petition did not state a cause of action, and that it merely stated conclusions.

We have frequently had before us these abbreviated petitions for divorce, wherein counsel for plaintiff merely pleads the

ground set up in the statute, without giving any details which, if proved, would sustain the allegations. We wish to register our condemnation of such forms of pleading. The defendant is entitled to know the facts upon which the action is based, other than the naked statement that he is guilty of extreme cruelty or other statutory offenses.¹ This form of pleading saves no time in that it gives rise to the contention upon the part of the defendant, either that the petition is demurrable, or subject to a motion to make definite and certain. If the pleader would state the facts which he claims constitute his cause of action, the matter could proceed without the delay incident to this abbreviated and in-artistic form of the pleading.

However, the matter is before us and there are, in our judgment, two very good reasons for the conclusions which we shall reach.

We feel safe in following the case of *Seibel v. Seibel*, 30 Ohio App. 198, 164 N. E. 648, decided by the Court of Appeals of Hamilton county. It was held in that case:

"1. Petition for divorce alleging statutory grounds of extreme cruelty and gross neglect of duty towards plaintiff stated cause of action, without necessity of pleading facts constituting grounds.

"2. Where petition is indefinite and uncertain, trial court, on proper motion to make definite and certain, filed by adverse party, may in his discretion grant motion."

We entertain no doubt that the trial court would have granted a motion to make definite and certain if the same had been made, but defendant's counsel saw fit to file a demurrer which was overruled, and which is the basis of this appeal.

We overrule the first assignment and hold that the judgment of the court in overruling the demurrer was not erroneous.²

The appeal is dismissed and the cause is remanded.

Appeal dismissed and cause remanded.

PROBLEM

In the light of the preceding and the following cases in this Chapter, consider if it is significant for pleading whether a complaint is required to contain a statement of the plaintiff's claim.

¹ Ohio Code Ann. § 11979 (1940) provides: "Courts of common pleas may grant divorces for the following causes: . . . 5. Extreme cruelty . . . 7. Any gross neglect of duty. . . ."

² The second ground of the court's decision, discussion of which is omitted, was that an order overruling a demurrer with leave to plead, is not an appealable order.

showing that he is entitled to relief (Fed. R. Civ. P., 8 (a), *supra* p. 137) or is required to state the facts constituting the plaintiff's cause of action (N. Y. Civ. Prac. Act, §§ 241, 255, *supra* pp. 136, 166), and if so, in what respects it is significant.

Consider, also, which of these requirements is the more desirable.³

GERBER v. SCHUTTE INVESTMENT COMPANY

Supreme Court of Missouri, 1946. 354 Mo. 1246, 194 S.W.2d 25.

VAN OSDOL, COMMISSIONER. Plaintiff by his amended petition sought to recover \$25,000 damages for personal injuries. On motion of defendant (a lessor), and a third-party defendant (a lessee who had undertaken to protect the lessor from liability), the petition was dismissed with prejudice¹ and judgment rendered against plaintiff. But the trial court granted a new trial, and defendant and third-party defendant have appealed.

The grounds assigned by the trial court for sustaining the motion for a new trial are,

"1. Because the court erred in holding that plaintiff's petition was insufficient to state a cause of action.

"2. Because the court erred in holding that plaintiff's petition showed he was guilty of contributory negligence as a matter of law."

The allegations of the petition in such parts as are necessary for review herein are as follows,

"1. Comes now . . . plaintiff and for his cause of action against the above named defendant alleges that said defendant . . . owns and operates a building at 1209-1211 Grand Avenue, sometimes known as the Schutte Building, and operates therein an elevator which serves the tenants thereof.

"2. Plaintiff further alleges that under and by virtue of the Laws and Ordinances of Kansas City, Jackson County, Missouri, to-wit, Subsection (b), Section 4 of Article 44, it is made and provided as follows: '(b) Every door opening in passenger elevator hatchways shall be equipped with self-closing doors, and the doors shall be equipped with approved electric, mechanical or electro-mechanical interlocks designed to prevent the operation of the car until the doors are closed.'

"3. Plaintiff further alleges that on or about the fifth day

³ See Fee, *The Lost Horizon in Pleading under the Federal Rules of Civil Procedure*, 48 Col. L. Rev. 491 (1948).

¹ Mo. Rev. Stat. Ann. § 847.101 (Cum. Supp. 1946): "A dismissal without prejudice permits the party to bring another action for the same cause, unless the action is otherwise barred. A dismissal with prejudice operates as an adjudication upon the merits. . . ."

of October, 1938, he operated² said elevator in said building to the street entrance or first floor of said building and left it with the door open for a few minutes; that during said period of time, without said door of said elevator being closed, said elevator moved and left the position in which plaintiff had stopped it, and that when plaintiff attempted to board said elevator at said first floor he stepped into the elevator shaft and was caused to fall and be precipitated to the basement floor many feet below, as a direct result of all of which he was greatly bruised, . . .

"4. Plaintiff further alleges that all of his said injuries and disabilities were directly and wholly caused and brought about by the negligent, careless and unlawful acts and omissions of the defendant, all to the damage of plaintiff . . .

"Wherefore, plaintiff prays judgment against the defendant for the sum of"

Defendants (appellants) contend, (1) the petition is insufficient as a statement of facts upon which relief could be granted, because (a) no facts are alleged showing the subsection of the alleged ordinance was applicable to the elevator in question, (b) no facts are alleged showing a violation of the ordinance, (c) no facts are alleged showing causal connection between the assumed violation of the ordinance and plaintiff's injury, and (d) no facts are alleged showing a duty of defendant to protect plaintiff; and (2) under the allegations in the petition plaintiff was guilty of contributory negligence as a matter of law in walking into the open elevator shaft without exercising ordinary care in looking to see that the elevator car was at the floor level.

(1) Although the petition was filed and amended prior to the effective date, January 1, 1945, of the Civil Code of Missouri, Laws of Missouri 1943, p. 353, et seq., Mo. R. S. A. § 847.1 et seq., the action was pending and the trial court's order in sustaining the motion to dismiss was made after the effective date of the Code. It may here also be noted that when the motion to dismiss was sustained, a motion had long been pending (and undisposed of) to require the plaintiff to make the petition more definite and certain by alleging with particularity what negligent and unlawful acts and omissions of defendant caused the injury.

The Civil Code of Missouri, *supra*, Section 35, provides that each averment of a pleading shall be simple, concise and direct; Section 36, that a pleading which sets forth a claim for relief shall contain a short and plain statement of the facts showing that

² But in what capacity, as "trespasser," "licensee," "business visitor," or "tenant"? See Prosser, Torts, §§ 77-79, 81 (1941).

the pleader is entitled to relief; and, Section 62, that an objection of failure to state a claim upon which relief may be granted may be raised by motion, when the ground for such an objection appears on the face of the pleading. And see Section 63, providing for a motion for a more definite statement of facts or for a bill of particulars of any matter not averred with sufficient definiteness or particularity to enable the adverse person to properly plead or to prepare generally for trial; Section 57, providing that all pleadings shall be so construed as to do substantial justice; Section 81, providing that leave to amend a pleading shall be freely given where justice so requires; Sections 85 to 89, broadly implementing an examination and discovery of facts; Section 84, authorizing the trial court in its discretion to direct counsel to appear for a pretrial conference. These and other sections of the Code signalize a comparatively new, various and more intensified approach to the accomplishment of the ultimate aim of all civil procedure than had been used under the (now repealed) provisions of the Civil Code of 1849.

We must appreciate and endeavor to effectively use the various means provided for attaining the objectives of the Civil Code of Missouri. It has been appropriately said that the primary objectives of the Code are to simplify legal procedure; to expedite trials and appellate reviews; and to lessen the expense of litigation—all to the end that substantial justice will be done between parties litigant. The number of cases that were formerly disposed of on technicalities is to be reduced; the merits of a case are to be passed upon and reviewed. By the speeding up of trials and review, and by the lessening of expense of litigation, bench and bar will more nearly and more efficiently fulfill their high responsibilities, and a more extensive use of the judicial process will be enjoyed by the people. The Modernized Civil Code of Missouri, Hon. Charles L. Carr, 9 M. L. R. 1, at page 2; see now Section 2 of the Code, "It (the Code) shall be construed to secure the just, speedy, and inexpensive determination of every action." Unquestionably, there has been some improvement in recent years in the practical operation of the Civil Code of 1849 by reason of an increasing tendency of appellate courts to give a liberal rather than a technical construction to procedural statutes in their efforts to determine cases on the merits. Nevertheless, the old Code provisions continued some common-law methods of pleading which made it possible to conceal issues and spring surprises at the trial. The basic principle of the new Code provisions is just the opposite. The aim is to determine what are the controversial issues before the trial begins, and limit the trial to them. General Principles, The Civil Code

Act of 1943, Hon. Laurance M. Hyde and Hon. James M. Douglas, 14 M. B. J. 315. And see Address of Hon. Laurance M. Hyde at the final annual, 1944, meeting of the Missouri Bar Association at St. Louis, 15 M. B. J. 166, at page 167. From these observations, and from the sections of the Civil Code of Missouri some of which we have mentioned supra, it is realized that whatever necessary procedural means provided by the Code should be used to determine what the controversial issues are before the trial—all to the end that “substantial justice will be done between parties litigant.” But the pleadings continue to be of the greatest utility in defining the issues of a case. And it is not to be understood that the petition in stating plaintiff’s claim has lost its usefulness as a means of arriving at the primary objectives of the Code. On the contrary, it is to be understood that the petition is to be of the same usefulness as before, or of more usefulness than before, in plainly stating the facts upon which the plaintiff relies as showing that he is entitled to recover. It would not be helpful to the cause of substantial justice to ignore or abandon what learning and experience have found to be a plain statement of the facts of a claim, or of a defense. It has been noticed that the controversial term “cause of action” is nowhere used in the Civil Code of Missouri. No practical difference is seen between the new “claim for relief” and the old “cause of action.”³ See Pleading Provisions of the 1943 Civil Code Act, Hon. Laurance M. Hyde and Hon. James M. Douglas, 15 M. B. J. 71, at page 72; and Address of Hon. Paul V. Barnett, Printed Transcript of Institute on Code of Civil Procedure, Auspices of The Bar Association of St. Louis, page 20. Further, note the difference between the required “short and plain statement of the facts” of Section 36, Civil Code of Missouri, supra, and a “short and plain statement of the claim,” as required by Rule 8 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. But it is further to be understood that technicalities in pleadings are not longer to be used to conceal issues and to ambush the adverse party, thereby depriving him of a just adjudication of his case on the merits.

By a pleader’s plain statement of the facts, the trial court and the adverse party may see what principles of substantive law are applicable to the facts so plainly stated, and the adverse party may at once be enabled to ascertain from the plain statement of facts what the determinative facts are which he may believe himself to be able to controvert, or to confess and avoid—thus (by the aid of the pleadings alone) are some or all of the con-

³ Cf. *Devault v. Truman*, 354 Mo. 1193, 194 S.W.2d 29 (1946): “We find no practical difference between a ‘failure to state a claim upon which relief can be granted’ and a failure to state a cause of action, as formerly understood.”

troversial trial issues isolated, the trial expedited, and the expense of the trial lessened. Counsel for plaintiff has a responsibility in the furtherance of the purposes of the Code, and will be doing great service in so plainly stating the facts, if possible, that it will be unnecessary for defendant (in order to prepare responsive pleadings or to prepare generally for trial) to move for further amplification.

Examining plaintiff's petition in the instant case—it is apparent that the pleading, as a short and "plain" statement of facts, is not all that could be desired. For example, if by intendment it can be implied that plaintiff relied upon the violation of the requirement of the alleged ordinance relating to the safety self-closing equipment of elevator hatchway doors, why did not plaintiff plainly state that the doors were not so equipped and the failure to so equip the doors was the omission causing plaintiff's injury? (Of course, if facts are plainly stated which invoke the application of the *res ipsa loquitur* rule, no statement of specific acts of negligence of defendant would be essential.) Doubtless had plaintiff made a plain statement of the facts, he and defendant and the trial court would have long since determined and resolved whatever controversial issues are in the case.

But, as stated supra, the trial court granted the new trial upon an assigned ground of error in holding that "plaintiff's petition was insufficient to state a cause of action," or now to be more properly assigned as error in holding that plaintiff's petition "failed to state a claim upon which relief can be granted." Ignoring the imperfections and uncertainties of the petition and according its allegations with every reasonable and fair intendment, it is not to be said that the facts stated would not invoke the application of principles of substantive law which would entitle plaintiff to the relief he seeks. And, as has been observed, the disposition of cases on the merits is desired. But, assuming a pleader cannot state a claim (or legal defense) after he has had opportunity to discover the actual facts and amend, substantial justice would not be served by permitting the pleader to nevertheless avail himself of trial procedure. However, the purpose and intent of the Code would not be consummated by sustaining a motion to dismiss with prejudice (or by the rendition of judgment for plaintiff on the ground that defendant had failed to state a legal defense) where the pleader has not been allowed reasonable time or opportunity to amend, or to avail himself of the other procedure provided by the Code, if necessary, for ascertaining actual facts which would enable him to amend and state a claim or defense. The procedural action, provided by the Code, which is taken or allowed in the furtherance of the Code's primary

objectives, and the reasonableness of time or opportunity allowed a pleader to avail himself of the Code's procedure are peculiarly within the trial court's discretionary province; and the court's action (except it be arbitrary) in the furtherance of such objectives will not be disturbed.

(2) It may be, if the cause is tried, that plaintiff's evidence will conclusively show that he was guilty of contributory negligence. If so, plaintiff could not recover (although the defendant may not have affirmatively pleaded contributory negligence). See *Keeter v. Devoe & Raynolds*, 338 Mo. 978, 93 S. W. 2d 677, and cases therein examined. On the other hand, it would not be held, regardless of whatever other circumstances were shown in evidence, that a plaintiff was guilty of contributory negligence merely because he failed to see that an elevator car was not at the floor level. *Unrein v. Oklahoma Hide Co.*, 295 Mo. 353, 244 S. W. 924; 9 R. C. L., *Elevators*, § 23, p. 1257. If defendant is of the opinion plaintiff was contributorily negligent under such circumstances as may be shown in evidence and wishes to surely avail of the defense, defendant should set forth the defense affirmatively. Civil Code of Missouri, *supra*, Section 40.

The order granting the new trial should be affirmed.

It is so ordered.

BRADLEY and DALTON, CC., concur.

PER CURIAM. The foregoing opinion by VAN OSDOL, C., is adopted as the opinion of the court.

All of the Judges concur.⁴

DIOGUARDI v. DURNING

Circuit Court of Appeals of the United States, Second Circuit, 1944.
139 F.2d 774.

CLARK, CIRCUIT JUDGE. In his complaint, obviously home drawn, plaintiff attempts to assert a series of grievances against the Collector of Customs at the Port of New York growing out of his endeavors to import merchandise from Italy "of great

⁴ *Cf. Langenberg v. City of St. Louis*, 355 Mo. 634, 197 S.W.2d 621 (1946): "The legislature in enacting the new Code has not sanctioned 'notice pleading' which, it has been asserted by some, is contemplated by the Federal Rules of Civil Procedure The legislature considered it more helpful that we should not ignore or abandon what learning and experience have found to be a plain statement of the facts (rather than conclusions) constituting a claim or cause of action. . . . The difference between the required 'short and plain statement of the facts showing that the pleader is entitled to relief' of Section 36, Civil Code of Missouri, *supra*, and the 'short and plain statement of the claim' showing the pleader is entitled to relief as required by Rule 8 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, has been noticed. *Gerber v. Schutte Investment Company*, *supra*."

value," consisting of bottles of "tonics." We may pass certain of his claims as either inadequate or inadequately stated and consider only these two: (1) that on the auction day, October 9, 1940, when defendant sold the merchandise at "public custom," "he sold my merchandise to another bidder with my price of \$110, and not of his price of \$120" and (2) "that three weeks before the sale, two cases, of 19 bottles each case, disappeared." Plaintiff does not make wholly clear how these goods came into the collector's hands, since he alleges compliance with the revenue laws; but he does say he made a claim for "refund of merchandise which was two-thirds paid in Milano, Italy," and that the collector denied the claim. These and other circumstances alleged indicate (what, indeed, plaintiff's brief asserts) that his original dispute was with his consignor as to whether anything more was due upon the merchandise, and that the collector, having held it for a year (presumably as unclaimed merchandise under 19 U.S.C.A. § 1491), then sold it, or such part of it as was left, at public auction. For his asserted injuries plaintiff claimed \$5,000 damages, together with interest and costs, against the defendant individually and as collector. This complaint was dismissed by the District Court, with leave, however, to plaintiff to amend, on motion of the United States Attorney, appearing for the defendant, on the ground that it "fails to state facts sufficient to constitute a cause of action."

Thereupon plaintiff filed an amended complaint, wherein, with an obviously heightened conviction that he was being unjustly treated, he vigorously reiterates his claims, including those quoted above and now stated as that his "medicinal extracts" were given to the Springdale Distilling Company "with my betting (bidding) price of \$110: and not their price of \$120," and "It isn't so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance." An earlier paragraph suggests that defendant had explained the loss of the two cases by "saying that they had leaked, which could never be true in the manner they were bottled." On defendant's motion for dismissal on the same ground as before, the court made a final judgment dismissing the complaint, and plaintiff now comes to us with increased volubility, if not clarity.

It would seem, however, that he has stated enough to withstand a mere formal motion, directed only to the face of the complaint, and that here is another instance of judicial haste which in the long run makes waste. Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there

be "a short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c; and the motion for dismissal under Rule 12(b) is for failure to state "a claim upon which relief can be granted."¹ The District Court does not state why it concluded that the complaints showed no claim upon which relief could be granted; and the United States Attorney's brief before us does not help us, for it is limited to the prognostication—unfortunately ill founded so far as we are concerned—that "the most cursory examination" of them will show the correctness of the District Court's action.

We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced—and, indeed, required by 19 U.S.C.A. § 1491, above cited, and the Treasury Regulations promulgated under it, formerly 19 CFR 18.7-18.12, now 19 CFR 20.5, 8 Fed. Reg. 8407, 8408, June 19, 1943. As to this latter claim, it may be that the collector's only error is a failure to collect an additional ten dollars from the Springdale Distilling Company; but giving the plaintiff the benefit of reasonable inferences in his allegations (as we must on this motion), the claim appears to be in effect that he was actually the first bidder at the price for which they were sold, and hence was entitled to the merchandise. Of course, defendant did not need to move on the complaint alone; he could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting. It appears to be well settled that the collector may be held personally for a default or for negligence in the performance of his duties. [Citations omitted.]

On remand, the District Court may find substance in other claims asserted by plaintiff, which include a failure properly to catalogue the items (as the cited Regulations provide), or to allow plaintiff to buy at a discount from the catalogue price just before the auction sale (a claim whose basis is not apparent), and a violation of an agreement to deliver the merchandise to the

¹ But cf. *Patten v. Dennis*, 134 F. 2d 137 (C.C.A. 9th 1943): "The requirements of a complaint may be stated . . . as being a statement of facts showing (1) the jurisdiction of the court; (2) ownership of a right by plaintiff; (3) violation of that right by defendant; (4) injury resulting to plaintiff by such violation. . . ."

plaintiff as soon as he paid for it, by stopping the payments. In view of plaintiff's limited ability to write and speak English, it will be difficult for the District Court to arrive at justice unless he consents to receive legal assistance in the presentation of his case. The record indicates that he refused further help from a lawyer suggested by the court, and his brief (which was a recital of facts, rather than an argument of law) shows distrust of a lawyer of standing at this bar. It is the plaintiff's privilege to decline all legal help, *United States v. Mitchell*, 2 Cir., 137 F. 2d 1006, 1010, 1011; but we fear that he will be indeed ill advised to attempt to meet a motion for summary judgment or other similar presentation of the merits without competent advice and assistance.

Judgment is reversed and the action is remanded for further proceedings not inconsistent with this opinion.²

PEOPLE v. McCLOSKEY

Supreme Court of Colorado, 1944. 112 Colo. 488, 150 P.2d 861.

YOUNG, CHIEF JUSTICE. This action was instituted by the People of the State of Colorado on the relation of Martha Bauer as plaintiff, against Willis Morris, the sheriff of Arapahoe county, and the United States Fidelity and Guaranty Company, a corporation, surety on his official bond, to recover damages for the death of relator's husband, allegedly wrongfully caused by Ray McCloskey, a deputy sheriff, by the exercise of unreasonable and excessive force while engaged in his official duty to preserve the peace, and in the exercise of which he struck relator's husband, knocking him to the pavement and causing a fracture of his skull, which injury resulted in his death.

A motion to dismiss the action on the ground that the amended complaint failed to state a claim against the defendants upon which relief could be granted, was interposed by the latter. The court sustained the motion and, relator electing to stand on her complaint, entered judgment dismissing the action. Specifying this ruling as error, she brings the matter here for review.

The alleged insufficiency of the complaint to state a claim is in the allegations contained in the fifth paragraph of the amended complaint which is as follows: "Fifth: That heretofore and on, to wit, the 21st day of January, A.D. 1940, at about the

² Of the decision in this case, Frank, J., said in his dissent in *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation*, 154 F.2d 814, 823 (C.C.A. 2d 1946): "[T]his court has gone extremely far in generously granting relief to a bewildered party on the basis of an 'afterthought' which did not even occur to the party but was conceived, on appeal, by this court itself."

hour of 2.00 o'clock A.M., the said George Bauer was leaving a resort commonly known as 'Rock Rest,' in said Jefferson county, and situated on the road commonly known as the 'Golden Road,' in said county, for the purpose of going to his home located west of said resort and near the same road; that the said defendant Ray McCloskey was then and there deputized and stationed at said resort to conserve the public peace there at said resort and the territory adjacent thereto; that the said Ray McCloskey, hearing some of the loud remarks of the said George Bauer, made in his presence which disturbed the peace of the place and while in the performance of his duties as special deputy sheriff and under color of his office and while maintaining peace and order in that vicinity, did unlawfully and wrongfully and with force and violence unnecessary to the performance of his duties and the maintenance of law and order at the time and place in question, strike the said George Bauer with such force and violence that he was knocked to the pavement with such force and violence that his skull was then and there fractured by reason whereof the said George Bauer thereafter and on, January 26, 1940, died; that the said Ray McCloskey in the performance of his duties as aforesaid used unnecessary force in carrying out his said duties at said time and place."

A complaint under the Code of Civil Procedure, to be invulnerable to attack by a general demurrer was required to contain allegations of ultimate facts constituting a cause of action. A complaint under the Rules of Civil Procedure, to be sufficient as a claim against a motion to dismiss is required to advise defendant of the nature of the relief sought against him and the grounds thereof. It is not a valid objection on such a motion that the grounds of recovery appear partly from allegations of fact and partly from allegations of legal conclusions of the pleader.

Rule 8 C (e) (1), R. C. P. Colo. is as follows: "Each averment of a pleading shall be simple, concise, and direct. When a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts, as distinguished from conclusions of law."

The corresponding Federal Rule 8,¹ 28 U. S. C. A. following section 723c, does not contain the second and fourth sentences contained in our Rule; otherwise, it is the same.

¹ Cf. *Porter v. Karavas*, 157 F. 2d 984, 985 (C.C.A. 10th 1946): "The purpose of the rule is to eliminate prolixity in pleading and to achieve brevity, simplicity and clarity."

The defense in law which defendants raised by their motion under our Rule 12 C (b) (6) is "failure to state a claim upon which relief can be granted." While this motion may in some cases serve the purpose of a demurrer under the Code, and is analogous to it in some respects, it is not an identical attack. In relying on the case of *People v. Beach*, 49 Colo. 516, 113 P. 513, 515, 37 L. R. A., N. S., 873, which arose and was determined in this court on a judgment of the district court dismissing plaintiff's complaint following the sustaining of a demurrer under the Code, defendants here assume the identity of the Code demurrer and the motion to dismiss for failure to state a claim upon which relief can be granted under the Rules of Civil Procedure. Two quotations from the opinion in that case will illustrate why it is not controlling.

"It is not enough, in an action of this kind, for the pleader generally to state that the officer is acting 'by virtue of, or under color of, his office,' or that the acts are of such a character as are authorized by law, or that the same constitute his official duty. These are merely conclusions of the pleader and not statements of fact at all. . . .

"It is necessary here merely to say that the complaint is not sufficient, in that it signally fails to show by proper averment of facts, although conclusions of law may be pleaded, that the acts charged against the deputy sheriff were done by virtue of or under color of his office."

In the complaint before us plaintiff alleges that defendant Morris was the duly qualified and acting sheriff; that he executed his official bond as required by law and that defendant, United States Fidelity and Guaranty Company, a corporation, is surety on the bond; that McCloskey was a duly appointed deputy sheriff; that he was stationed at the "Rock Rest," a resort in Jefferson county, to conserve the peace there and in the territory adjacent thereto (an official duty under section 106, chapter 45, '35 C. S. A.); that the deputy heard loud remarks of decedent Bauer, which disturbed the peace of the place (a conclusion), that in the performance of his duties, and under color of his office and while maintaining peace and order in that vicinity (also conclusions), that he "unlawfully and wrongfully and with force and violence unnecessary to the performance of his duties (also conclusions)", struck the said George Bauer, etc. If the conclusions of law alleged, rather than the ultimate facts from which they flow, be accepted as not objectionable to support the claim, as we think they must be under Rule 8 C (e) (1) *supra*, then the complaint is sufficient as against the motion to dismiss, and it was error for the court to sustain the motion and dismiss

the action. That this is in accordance with the construction of the similar federal rule seems clear, for the effect of *Eberle v. Sinclair Prairie Oil Co.*, D. C., 35 F. Supp. 296, 297, as stated in the syllabus is, that a complaint will not be dismissed "unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim, in view of means afforded defendant by federal rules to obtain speedy disposition of claim without foundation or substance."

The holding in *Sparks v. England*, 8 Cir., 113 F. 2d 579, 582, is "If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted."

In *Leimer v. State Mut. Life Assur. Co.*, 8 Cir., 108 F. 2d 302, 306, the court had under consideration a motion similar to that in the instant case, and in the course of the opinion, said: "In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12 (e) and thereafter applying for judgment on the pleadings under Rule 12 (h) (1), or by moving for a summary judgment under Rule 56, we think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."²

The judgment is reversed and the cause remanded for further proceeding in accordance with law.³

NOTE

Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947): "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving,

² In *Sparks v. England*, 113 F. 2d 579, 580-581 (1940), the same court said: "This Court has consistently disapproved of the practice of terminating litigation, believed to be without merit, by the dismissal of complaints for informality or insufficiency of statement. . . . If it is conceivable that, under the allegations of the complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted."

³ See *Sierocinski v. E. I. Du Pont De Nemours & Co.*, 103 F.2d 843 (C.C.A. 3d 1939); *De Loach v. Crowley's Inc.*, 128 F.2d 378 (C.C.A. 5th 1942); *Mails v. Kansas City Public Service Co.*, 51 F. Supp. 562 (D.C. W. D. Mo. 1943); *Dennis v. Tonka Bay*, 151 F.2d 411 (C.C.A. 8th 1945); *Proper Generality of Allegation in Pleading under the Federal Rules*, 4 Fed. Rules Serv. 890 (1941); Note, 28 Calif. L. Rev. 235 (1940). Cf. *Foley-Carter Insurance Co. v. Commonwealth Life Insurance Co.*, 128 F.2d 718 (C.C.A. 5th 1942).

issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings.⁴ Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method.⁵ The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."⁶

BEST FOODS, INC. v. GENERAL MILLS, INC.

District Court of the United States, District of Delaware, 1943. 3 F.R.D. 275.¹

Action by the Best Foods, Inc., National Oats Company, Northern Illinois Cereal Company, and the Quaker Oats Company, against General Mills, Inc., to restrain defendant from using the word "oats" in respect to food marketed under the name "Cheerioats." On defendant's motion for a more definite statement of certain matters averred in the complaint.

Motion denied.

LEAHY, DISTRICT JUDGE. The motion for consideration is by defendant under Rule 12(e) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, for a more definite statement of matters averred in paragraphs 9, 13 and 14 of the complaint.

Plaintiffs manufacture commercially prepared oats under various trade names. Defendant's product is a ready-to-eat breakfast food called "Cheerioats". Plaintiffs seek to prevent defendant from using the word "oats" because defendant's product is not oats; it does not contain the qualities which defendant claims for it; defendant, by misnaming its product and claiming it has the qualities of plaintiffs' products, is attempting to take "a free ride" on plaintiffs' efforts and the reputation

⁴ "The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials." Sunderland, "The Theory and Practice of Pre-Trial Procedure," 36 Mich. L. Rev. 215, 216. See also Ragland, *Discovery Before Trial* (1932), ch. I. [Footnotes by the court.]

⁵ 2 Moore's Federal Practice (1938) § 26.02, pp. 2445-2455.

⁶ Pike and Willis, "The New Federal Deposition-Discovery Procedure," 38 Col. L. Rev. 1179, 1436; Pike, "The New Federal Deposition-Discovery Procedure and the Rules of Evidence," 34 Ill. L. Rev. 1.

¹ All footnotes are the court's, except footnote 2, but they have been renumbered.

of their products; defendant's conduct is in violation of apposite statutes and plaintiffs' common-law rights; and, defendant's conduct is not only in violation of plaintiffs "legally protected interests", but is actionable as unfair competition.

For convenience of consideration, three parallel columns are utilized to show (1) the pertinent allegations of paragraphs 9, 13 and 14; (2) defendant's argument as to the effect of plaintiffs' language; and (3) defendant's reasons why the complaint allegations are of such indefiniteness as to require further particularization:

"9. Defendant's product, which it now describes as 'Cherrioats', is a multiple ingredient, ready-to-eat food made by a process which destroys many of the natural nutritive values of the oat grain, some but not all of which are represented by the defendant to be synthetically restored. Defendant's product is not oats; possesses neither all nor the same nutritional values of oats."

"13. Plaintiffs state that defendant's product, which it falsely masquerades as oatmeal in ready-to-eat form and which it represents as having the nutritional values of oatmeal, is not as nutritious as oatmeal, does not possess the same or all of the nutritional values of oatmeal . . ."

This allegation, inter alia, is that defendant's product is a multiple ingredient, ready-to-eat food which (1) is made by a process which destroys *many* of the natural nutritive values of the oat grain; (2) is not oats; (3) does not possess "all" the nutritional values of oats; and (4) does not possess the "same" nutritional values as oats.

Plaintiffs allege, inter alia, that defendant's product (1) "is not as nutritious as oatmeal;" (2) does not possess the "same" nutritional values as oatmeal; and (3) does not possess "all" of the nutritional values of oatmeal.

What nutritive values *are claimed* to be destroyed? What nutritive values are absent from defendant's product when compared with oats? What nutritive values are present in defendant's product and absent from oats? Does the reference to "nutritive" and "nutritional" values mean qualitatively or quantitatively?

Defendant's product is compared with oatmeal. How, or in what respects, is it claimed that oatmeal is more nutritious than Cherrioats? What nutritional values are claimed to be present in oatmeal but absent from Cherrioats? What nutritive values are claimed to be present in Cherrioats but absent from oatmeal? What is lacking in Cherrioats making it less nutritious than oatmeal? Are the deficiencies in calcium, iron, niacin, protein, thiamine or in some other vitamin or mineral or otherwise?

"14. . . . Plaintiffs state that the substitution of defendant's product for the oats manufactured by plaintiffs may be injurious to the health of consumers, particularly of growing children, because said product is not oats and is not as nutritious as oats."

What is the nature of the injury which plaintiffs *claim* may result, either to growing children or to adults?

In support of a more definite statement from paragraphs 9 and 13 defendant argues it will be required to indulge at great financial cost in vast research work to meet claims which may never be presented at trial; and, if it fails to make such experiments, it runs the chance of being unable to meet claims which plaintiffs might make at trial and which cannot now be known from the language of paragraphs 9 and 13. As for paragraph 14, defendant contends that if it is required to make a blanket denial in its answer to the complaint it will not know until trial the type of injury to consumers and growing children particularly, plaintiffs will attempt to prove under this paragraph.

Since the adoption of the Rules of Civil Procedure in 1937, there is a growing lack of uniformity in the cases which have dealt with Rule 12 (e).² But there can seldom, if ever, be homogeneity of judicial decision where the result depends on the exercise of each court's discretion. Rule 12 (e) is but one of many which is directed to simplify procedure;³ hence, when Rule 8 (a) directs a "short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 8 (e) states that "each averment of a pleading shall be simple, concise, and direct", the sought simplicity and speed of bringing a cause to trial will be subverted if greater emphasis is granted to one rule, for example Rule 12 (e), over another. In view of the fact that the new rules open new approaches to discovery and afford other techniques to drive the adversary's case out into the open before

² When this case was decided, Rule 12(e) provided: "Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements." The rule has since been amended. See *infra* p. 256, note 4.

³ E. I. Dupont de Nemours & Co. v. Dupont Textile Mills, 26 F. Supp. 236.

trial, it has been suggested that the bill of particulars device be abolished.⁴ On the other hand, the function of the complaint has been concisely defined, at least in this circuit.⁵

Obviously, the complaint here gives more than a general indication of the type of litigation involved as acts of unfair competition arising from misnaming of defendant's product and false statements concerning the nature and qualities of that product are alleged. In any event, the matters which defendant seeks are not to "properly prepare his responsive pleading." True, the rule looks to particulars in order that defendant may "prepare for trial." But these latter words, I think, are not properly contained in the rule in the sense in which they have sometimes been construed. Rule 12 (e) was not inserted into the new federal procedure so that it might have an exploratory and preliminary function of discovery.

In order to "prepare for trial" connotes evidentiary material; and relief under Rule 12 (e) should be limited to allegations in a complaint which are so ambiguous that a defendant is unable to determine the *issues* he must meet. *Wisconsin Alumni Research Foundation v. Vitamin Technologists, Inc.*, D. C., 1 F. R. D. 8; *United States v. Schine Chain Theatres, Inc.*, D. C., 1 F. R. D. 205; *Knupfer v. Albertson & Co., Inc.*, D. C., 1 F. R. D. 257; *Pearson v. Hershey, etc., Co.*, D. C., 30 F. Supp. 82; *Kellogg Co. v. National Biscuit Co.*, D. C., 38 F. Supp. 643; *Poole v. White*, D. C., 2 F. R. D. 40; *Fleming v. Mason & Dixon Lines, Inc.*, D. C., 42 F. Supp. 230. Rule 12 (e) is no longer a court favorite. Liberal construction of the other methods of obtaining pretrial discovery should be followed in an attempt to encourage the bar to utilize such other means.

If defendant fears surprise at trial, means are available, in a proper manner and at a proper time, to procure the evidentiary material it now seeks to elicit by its motion under Rule 12 (e). With respect to plaintiffs' charges concerning defendant's product, it is only reasonable to conclude that defendant is aware of the contents of its own product and is familiar with the processes

⁴ "Events already indicate that these bills *ought to be abolished altogether*." Charles E. Clark, J., 25 A.B.A. Jour. 22. [Other citations to the same effect are omitted. Since the decision of the principal case Rule 12 (e) has been amended so as to "abolish bills of particulars altogether." See *infra* p. 256, note 4.]

⁵ *Continental, etc., v. Shober, Jr.*, 3 Cir., 130 F.2d 631, 635: "... to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved." See, too, *Minnesota, etc., Co. v. Carborundum Co.*, D.C. Del., 3 F.R.D. 5. In *Thompson-Starret Co. v. Chicago, etc., D.C.*, 3 F.R.D. 68, it was said: "A defendant is not entitled to a bill of particulars if the complaint is sufficiently explicit to enable the defendant to know with what he is charged and to answer yes or no, to admit or deny, or to explain the charges made against him."

used in its manufacture before it named the product, marketed and advertised it. Data sought under Rule 12 (e) is always denied when the information sought is peculiarly within the knowledge of the moving party. *Louisiana Farmers' Protective Union v. Great A. & P. Co.*, D. C., 31 F. Supp. 483; *Kraft Corrugated Cont. v. Trumbull Asphalt Co.*, D. C., 31 F. Supp. 314.

Conclusion. The complaint performs its true function under Rule 8 (a, e). Defendant is not unable, at this time, to file a responsive pleading. The data it now seeks is of an evidentiary nature which will be—if it not already is—available to defendant if proper use of other means of pre-trial discovery under the rules is made.

Motion denied.

NOTE ON THE MOTIONS FOR A MORE DEFINITE STATEMENT AND FOR A BILL OF PARTICULARS

An indefinite pleading, whether complaint, counterclaim, answer or reply, may subject the pleader's opponent to two disadvantages: He may be unable to prepare a responsive pleading, if one is required, and he may be unable to prepare to meet the pleader's proofs at the trial. The procedural devices normally available to the pleader's opponent in this situation are the motion for a more definite statement and the motion for a bill of particulars.¹ Theoretically, the function of the first of these motions is to enable a party to obtain a sufficiently definite statement of his adversary's claim or defense to enable him to respond thereto by the appropriate pleading, while that of the second is to enable him to obtain the further information required to enable him to prepare for trial and to avoid the danger that he may be surprised by his adversary's proofs.²

However, this theoretical distinction is often difficult of practical application,³ was abolished by the course of decision

¹ Under the codes of some Western states the function of the motion to make more definite and certain is somewhat fulfilled by special demurrers for uncertainty, ambiguity and unintelligibility. See Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure*, 47 Yale L. J. 50, 52, 63 (1937). See also Cal. Code Civ. Pro. Ann. § 430 (1946), *infra* p. 411.

² See Clark, *Code Pleading*, 338-344, 548-549 (2d ed. 1947), and cases therein cited. In some jurisdictions the effect of a bill of particulars is limited by narrow rulings either that the bill adds nothing to the complaint or that it limits the broader allegations of the complaint to the matters specified in the bill. *Colby v. Wilson*, 320 Ill. 416, 151 N.E. (1926); Note, 8 A.L.R. 550 (1919). In some jurisdictions the use of the bill of particulars is restricted to suits upon an account. See, e.g., Cal. Code Civ. Proc. Ann. § 454 (1946). Under the more general rule, however, a bill may be obtained in any sort of action. Clark, *op. cit. supra*, at p. 338.

³ See *Bruce v. Odhams Press, Ltd.*, 52 T.L.R. 224, 228 (Ct. App. 1936): "The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information suffi-

under Rule 12(e) ⁴ of the Federal Rules of Civil Procedure as originally promulgated,⁵ and is disregarded by the courts of some of the states.⁶ The courts of other states have attempted to preserve the distinction in functions of the two motions,⁷ but the effort has resulted in excessive subtlety and great inconsistency in their decisions. Even if it were possible sharply to distinguish between the information which a party needs to enable him to plead and that which he requires to enable him to prepare for trial, it would nevertheless be difficult to understand why he should be compelled as a matter of course to resort to two motions in order to obtain what might often be gotten by a single motion; the practice is costly in time, effort and money.⁸ Whether the device to be employed for the purpose is the motion to make more definite and certain or the motion for a bill of particulars or either the one or the other, as the movant chooses, there

ciently detailed to put the defendant on his guard as to the case which he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a 'material fact' and a 'particular' piece of information which it is reasonable to give the defendant in order to tell him the case which he has to meet; hence, in the nature of things, there is often overlapping."

⁴ For the rule as originally promulgated, see *supra* p. 253, note 2. As amended, the rule provides: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just." As the Advisory Committee said in its Note upon this rule, as amended: "With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose." Federal Rules of Civil Procedure, 31 (West Pub. Co. rev. ed. 1947).

⁵ Of it, the Advisory Committee has said: "Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. . . . The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words 'or to prepare for trial'—eliminated by the . . . amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule." (*Op. cit. supra* note 4, at pp. 31-32.)

⁶ Cf. *Conover v. Knight*, 84 Wis. 639, 642, 54 N.W. 1002 (1893): "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law." See also *Stocklen v. Barrett*, 58 Or. 281, 114 P. 108 (1911); 24 Mich. L. Rev. 315 (1926).

⁷ See, e.g., *Groton Iron Works v. United States Shipping Board Emergency Fleet Corp.*, 283 F. 812 (D. Conn. 1922) (decided under the Equity Rules); *In re Mechler's Estate*, 129 Misc. 549, 221 N.Y.S. 606 (Sup. Ct. 1927); *Harrington v. Stillman*, 120 App. Div. 659, 105 N.Y.S. 75 (3d Dep't 1907). See also 3 *Carmony, Pleading and Practice in New York*, § 1028 (1931).

⁸ In New York the Judicial Council found a serious cause of delay in the great number of motions for bills of particulars. See Clark, *Simplified Pleading*, 6 Fed. Rules Serv. 819, 829-830; Clark, *The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A.J. 22, 23 (1939).

seems to be no good reason why he should not be permitted to seek all the information which he needs by a single motion made before he pleads, if he can then determine what information he needs to enable him to prepare for trial as well as to plead.⁹ This, however, is at best a compromise in the evolution of a simplified and efficient procedural system. From the standpoint of simplicity and efficiency it would be preferable to retain the motion for a more definite statement as the device whereby information needed for purposes of pleading may be gotten and to substitute discovery procedures for the motion for a bill of particulars as the devices whereby information needed for purposes of trial may be obtained. This was the prevalent practice under the Federal Rules of Civil Procedure,¹⁰ prior to the amendment of Rule 12 (e), and it was based not upon technical considerations but upon the recognition that motions which delay the joinder of issue are necessarily dilatory even when legitimately employed and that in addition they are often used to obstruct and delay the course of litigation.¹¹

HOLTZOFF, INSTRUMENTS OF DISCOVERY UNDER FEDERAL RULES OF CIVIL PROCEDURE

1942. 41 Mich. L. Rev. 205-206, 208-209, 213, 218, 222.*

Discovery has three distinct purposes and uses. At times, it may be invoked for only one of these objects, while on other occasions resort may be had to it for two or even all three pur-

⁹ See *Hooper v. Wm. P. Laytham & Sons, Inc.*, 125 N. J. Eq. 454, 6 A.2d 204, 205 (1939): "While [a bill of particulars] may not be employed as a means of compelling a disclosure of an adversary's evidence, nevertheless a bill of particulars may be used for the purpose of requiring the party to whom it is directed to give information relative to his case not only for the purpose of enabling his opponent to prepare a proper pleading in reply, but also for the purpose of limiting his own proof at the trial, as well as apprising his adversary of what is proposed to be set up, to the end that the latter may properly prepare his defense thereto."

¹⁰ *Tevington v. International Milling Co.*, 4 F.R.D. 507 (W.D.N.Y. 1945); *Bowles v. Karp*, 3 F.R.D. 327 (W. D. Ky. 1944); *Bruden v. Callaway*, 3 F.R.D. 147 (E. D. Tenn. 1943); *Pearson v. Hershey Creamery Co.*, 30 F. Supp. 82 (M. D. Pa. 1939).

Judge Clark has suggested the complete elimination of motions for certainty on the theory that the general objection that no claim for relief or defense has been stated would still be available and would be an adequate remedy. Clark, *Simplified Pleading*, 6 Fed. Rules Serv. 819, 830. But see Caskey and Young, *The Bill of Particulars—A Brief for the Defendant*, 27 Va. L. Rev. 472 (1941).

¹¹ See *Zimmerman v. Fillar*, 9 Fed. Rules Serv. 123, Case 10 (D.D.C. 1946, Holtzoff, J.): "A motion for a bill of particulars or more definite statement is made before answer. Whether so intended or not, its effect is dilatory because it postpones joinder of issue and calendaring of the case. On the other hand, if the information is obtained by discovery, the answer can be filed, issue can be joined, the case can be calendared, and during the interval between the time the case is placed on the calendar and the day it is reached for trial, the additional information can be obtained without delaying a trial on the merits."

* By permission of Michigan Law Review. All footnotes, except the last, are the author's, but they have been renumbered.

poses. Clarity of thought requires that, in discussing and analyzing the subject, regard be had to the distinction between them. These three uses of discovery are as follows:

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

(3) To secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts.

The new federal procedure provides four principal instruments for obtaining discovery: depositions, interrogatories to parties, production and inspection of documents, and requests for admissions.¹ . . .

The most potent and searching means of discovery provided by the new rules is depositions. After issue is joined, any party may take the deposition of any person whether or not the latter is a party to the litigation. The subject of the depositions, which may be taken either orally or on written interrogatories, may be "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party."² When the deponent is a party to the action, the proceeding is similar to that known as "examination before trial" in code practice although it may cover a much broader field than that permitted in some of the code states.

. . .

The principles governing the scope of depositions as formulated in the decisions of the courts may be summarized as follows:

(1) Any person, whether or not he is a party to the action, may be examined.

(2) The interrogation may relate to any relevant matter, not privileged, irrespective of whether its purpose is to narrow the issues, to obtain evidence for use at the trial or to ascertain where such evidence may exist and may be secured. Consequently, the rules as to admissibility of evidence, particularly those relating to competency, do not govern. Specifically, in-

¹ While the rules provide still another type of discovery—physical and mental examination of parties—the latter impinges on a somewhat different field and is outside the scope of this article.

² Rule 26 (b).

quiry may be made into the "existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." . . .

(3) The examination may relate to facts bearing on the claim or defense of the adverse party as well as that of the examining party.

(4) The examination need not be limited to ultimate facts, but may extend to evidentiary matters.

(5) The discovery need not be limited to matters exclusively or peculiarly within the knowledge or control of an adverse party. It may extend to matters of which the examining party has personal knowledge. Since the purpose of the discovery may be to narrow the issues or to procure evidence to be introduced at a trial, manifestly it seems an undue restriction that may hamper the purposes of the discovery to preclude the examining party from probing into matters of which he himself has knowledge. It may be obviously desirable for him to ascertain to what extent the facts will be admitted by his adversary. It may also be requisite for him to place them in such shape that they will be admissible at the trial. That the examining party may have knowledge of the facts may appear entirely inconsequential when full weight is accorded to the purposes of the discovery.³

(6) At the examination the production of documents may be required by means of a subpoena duces tecum.⁴ . . .

Another instrument of discovery provided by the Federal Rules of Civil Procedure consists of interrogatories. Any party is permitted to serve upon any adverse party written interrogatories to be answered by the latter under oath. In the event that the party to whom interrogatories are directed is a corporation, association, or partnership, the answers must be made by an officer competent to testify in its behalf. It will be observed that this means of discovery differs from depositions in two important respects. First, it may be used only as against adverse parties to a litigation and is not applicable to witnesses generally. Second, it does not permit an oral interrogation, but is limited to the service of written interrogatories and the submission of written responses.

³ *National Bondholders Corp. v. McClintic* (C.C.A. 4th 1938) 99 F.2d 595; *Nichols v. Sanborn Co.* (D. C. Mass. 1938) 24 F. Supp. 908; *Laverett v. Continental Briar Pipe Co.* (D.C.E.D.N.Y. 1938) 25 F. Supp. 80; *Lewis v. United Air Lines Transport Corp.* (D. C. Conn. 1939) 27 F. Supp. 946; *Bachrach v. General Investment Corp.* (D.C.S.D.N.Y. 1940) 31 F. Supp. 84; *Benevento v. A. & P. Food Stores* (D.C.E.D.N.Y. 1939) 26 F. Supp. 424. Rule 26(a) and (b).

⁴ Rule 45(d); *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.* (D.C.S.D.N.Y. 1938) 27 F. Supp. 121.

Necessarily, a great deal of the efficacy that attaches to oral examinations in the taking of depositions is lost when resort is had to written interrogatories. . . .

Another instrument of discovery relates to the production of documents. Rule 34 empowers the court, on motion of any party showing good cause and upon notice to all other parties, to order any party to produce and permit the inspection and copying of any designated documents, books, accounts, objects or tangible things, not privileged, which constitute or contain material evidence. The court may also make an order requiring any party to permit entry on designated property for the purpose of inspecting measuring, surveying, or photographing it or any designated relevant object or any operation thereon. It will be observed that the scope of such a discovery proceeding is much more narrow and restricted than that of depositions or interrogatories. First, such discovery may be had only by order of the court granted on motion for good cause. Second, the order must designate specific documents, papers or objects. Third, such an order may be issued only in respect to a document or object which constitutes or contains material evidence. . . .

The last instrument of discovery which will be considered in this article consists of requests for admissions provided by Rule 36. After the pleadings are closed, any party may serve upon any other party a written request for the admission by the latter of the truth of any relevant matters of fact set forth in the request; or of the authenticity of any relevant documents described and exhibited with the request.⁵ The party to whom a request is directed may respond by a sworn statement either specifically denying the matters in question or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. If neither of these courses is pursued, each of the matters stated in the request is deemed admitted. In other words, a burden is placed upon the person to whom the request is directed. Inaction on his part is equivalent to an admission.⁶

⁵ *Walsh v. Connecticut Mutual Life Ins. Co.* (D.C.E.D.N.Y. 1939) 26 F. Supp. 566; *McCrate v. Morgan Packing Co.* (D.C.N.D. Ohio 1939) 26 F. Supp. 812; *Nekrasoff v. United States Rubber Co.* (D.C.S.D.N.Y. 1939) 27 F. Supp. 953; *Smyth v. Kaufman* (C.C.A. 2d 1940) 114 F.2d 40.

⁶ See also Pike and Willis, *The New Federal Deposition—Discovery Procedure*, 38 Col. L. Rev. 1179, 1436 (1938); Willis, *Federal Discovery in Operation*, 7 Chi. L. Rev. 297 (1940).

Part IV

FORM AND SUBSTANCE

Chapter VII

FORMS OF ACTION

SECTION 1. THE NATURE OF A FORM OF ACTION

MAITLAND, THE FORMS OF ACTION AT COMMON LAW

Reprint 1941. 1-7.*

. . . The system of Forms of Action or the Writ System is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century.

What was a form of action? Already owing to modern reforms it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves. Let us then for awhile place ourselves in Blackstone's day, or, for this matters not, some seventy years later in 1830, and let us look for a moment at English civil procedure.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right, an assize of novel disseisin or of *mort d'ancestor*, a writ of entry *sur disseisin* in the *per* and *cui*, a writ of *besaiei*, of *quare impedit*, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted

* By permission of Cambridge University Press and The Macmillan Company, publishers. Author's footnotes omitted.

to cases of different kinds. Let us notice some of the many points that are implied in it.

(i) There is the competence of the court. For very many of the ordinary civil cases each of the three courts which have grown out of the king's court of early days, the King's Bench, Common Pleas and Exchequer is equally competent, though it is only by means of elaborate and curious fictions that the King's Bench and the Exchequer can entertain these matters, and the Common Pleas still retains a monopoly of those actions which are known as real.

(ii) A court chosen, one must make one's adversary appear; but what is the first step towards this end? In some actions one ought to begin by having him summoned, in others one can at once have him attached, he can be compelled to find gage and pledge for his appearance. In the assize of novel disseisin it is enough to attach his bailiff.¹

(iii) Suppose him contumacious, what can one do? Can one have his body seized? If he can not be found, can one have him outlawed? This stringent procedure has been extending itself from one form of action to another. Again, can one have the thing in dispute seized? This is possible in some actions, impossible in others.²

(iv) Can one obtain a judgment by default, obtain what one wants though the adversary continues in his contumacy? Yes in some forms, no in others.

(v) It comes to pleading, and here each form of action has some rules of its own. For instance the person attacked—the tenant he is called in some cases, the defendant in others—wishes to oppose the attacker—the demandant he is called in some actions, the plaintiff in others—by a mere general denial, casting upon him the burden of proving his own case, what is he to say? In other words, what is the general issue appropriate to this action? In one form it is *Nihil debet*, in another, *Non assumpsit*, in another "Not guilty," in others, *Nul tort, nul disseisin*.

(vi) There is to be a trial; but what mode of trial? Very generally of course a trial by jury. But it may be trial by a grand or petty assize, which is not quite the same thing as trial by jury; or in Blackstone's day it may still conceivably be a trial by battle. Again in some forms of action the defendant may betake himself to the world-old process of compurgation or wager of law. Again there are a few issues which are tried without a jury by the judges who hear witnesses.

¹ See Goebel, Development of Legal Institutions, 93, 107-109 (1946).

² See *op. cit.* note 1, at 108-109.

(vii) Judgment goes against the defendant, what is the appropriate form of execution? Can one be put into possession of the thing that has been in dispute? Can one imprison the defendant? Can one have him made an outlaw? Or can he merely be distrained?³

(viii) Judgment goes against the defendant. It is not enough that he should satisfy the plaintiff's just demand; he must also be punished for his breach of the law—such at all events is the theory. What form shall this punishment take: Will an amercement suffice, or shall there be fine or imprisonment? Here also there have been differences.⁴

(ix) Some actions are much more dilatory than others; the dilatory ones have gone out of use, but still they exist. In these oldest forms—forms invented when as yet the parties had had to appear in person and could only appoint attorneys by the king's special leave—the action may drag on for years, for the parties enjoy a power of sending essoins, that is, excuses for non-appearance. The medieval law of essoins is vast in bulk; time is allowed for almost every kind of excuse for non-appearance—a short essoin *de malo veniendi*, a long essoin *de malo lecti*. Now-a-days all is regulated by general rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules. This question of essoins has been very important—in some forms, the oldest and solemnest, a party may betake himself to his bed and remain there for year and day and meanwhile the action is suspended.

These remarks may be enough to show that the differences between the several forms of action have been of very great practical importance—"a form of action" has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice,

³ See *op. cit.* note 1, at 111-112.

⁴ See *op. cit.* note 3, at 114-115.

fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

The key-note of the form of action is struck by the original writ, the writ whereby the action is begun. From of old the rule has been that no one can bring an action in the king's courts of common law without the king's writ; we find this rule in Bracton—*Non potest quis sine brevi agere*. That rule we may indeed say has not been abolished even in our own day. The first step which a plaintiff has to take when he brings an action in the High Court of Justice is to obtain a writ. But there has been a very great change. The modern writ is in form a command by the king addressed to the defendant telling him no more than that within eight days he is to appear, or rather to cause an appearance to be entered for him, in an action at the suit of the plaintiff, and telling him that in default of his so doing the plaintiff may proceed in his action and obtain a judgment. Then on the back of this writ the plaintiff in his own or his adviser's words, states briefly the substance of his claim—"The plaintiff's claim is £1000 for money lent," "The plaintiff's claim is for damages for breach of contract to employ the plaintiff as traveller," "The plaintiff's claim is for damages for assault and false imprisonment," "The plaintiff's claim is to recover a farm called Blackacre situate in the parish of Dale in the county of Kent." We can no longer say that English law knows a certain number of actions and no more, or that every action has a writ appropriate to itself; the writ is always the same, the number of possible endorsements is as infinite as the number of unlawful acts and defaults which can give one man an action against another. All this is new. Formerly there were a certain number of writs which differed very markedly from each other. A writ of debt was very unlike a writ of trespass, and both were very unlike a writ of *mort d'ancestor* or a writ of right. A writ of debt was addressed to the sheriff; the sheriff is to command the defendant to pay to the plaintiff the alleged debt, or, if he will not do so, appear in court and answer why he has not done so. A writ of trespass is addressed to the sheriff; he is to attach the defendant to answer the plaintiff why with force and arms and against the king's peace he broke the plaintiff's close, or carried off his goods, or assaulted and beat him. A writ of *mort d'ancestor* bade the sheriff empanel

a jury, or rather an assize, to answer a certain question formulated in the writ. A writ of right was directed not to the sheriff but to the feudal lord and bade him do right in his court between the demandant and the tenant. In each case the writ points to a substantially different procedure.

In the reign of Henry III Bracton had said *Tot erunt formulae brevium quot sunt genera actionum*. There may be as many forms of action as there are causes of action. This suggests, what may seem true enough to us, that in order of logic Right comes before Remedy. There ought to be a remedy for every wrong; if some new wrong be perpetrated then a new writ may be invented to meet it. Just in Bracton's day it may have been possible to argue in this way; the king's court and the king's chancery—it was in the chancery that the writs were made—enjoyed a certain freedom which they were to lose as our parliamentary constitution became definitely established. A little later though the chancery never loses a certain power of varying the old formulas to suit new cases and this power was recognized by statute, still it is used but very cautiously. Court and chancery are conservative and Parliament is jealous of all that looks like an attempt to legislate without its concurrence. The argument from Right to Remedy is reversed and Bracton's saying is truer if we make it run *Tot erunt actiones quot sunt formulae brevium*—the forms of action are given, the causes of action must be deduced therefrom.

Of course we must not for one moment imagine that seventy years ago or in Blackstone's day litigation was really and truly carried on in just the same manner as that in which it was carried on in the days of Edward I. In the first place many of the forms of action had become obsolete: they were theoretically possible but were never used. In the second place the words "really and truly" seem hardly applicable to any part of the procedure of the eighteenth century, so full was it of fictions contrived to get modern results out of medieval premises: writs were supposed to be issued which in fact never were issued, proceedings were supposed to be taken which in fact never were taken. Still these fictions had to be maintained, otherwise the whole system would have fallen to pieces; any one who would give a connected and rational account of the system was obliged—as Blackstone found himself obliged—to seek his starting point in a very remote age.

NOTES

(1) First Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Courts of Common Law, 32 (1851): "It may be difficult to

define what is meant by a form of action. Practically, however, it may be said to be the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress. By the established practice of pleading, peculiar forms of expression characteristic of each action have been appropriated thereto, many of which are of a purely formal nature, and are wholly independent of the merits of the cause of action. Thus, as an instance, in those cases in which . . . trespass is the appropriate remedy, the plaintiff's declaration must state that the act complained of was done with force and arms, and against the peace, although the trespass may have been unaccompanied by violence; these allegations being unnecessary in case. Yet the distinction between the injuries to which these forms of action are respectively appropriate is . . . often of a very shadowy nature, and the ground of complaint must in each case be set forth with sufficient distinctness and particularity, independently of these technical forms. So in assumpsit and debt, which forms of action are in many cases equally available, particular forms of expression are necessary in each action, any departure or deviation from which would make the declaration bad. So in an action of assumpsit founded upon a bill of exchange or promissory note against an indorser, not only the bill and note and the indorsement, but also a promise to pay, must be expressly stated. No such promise need, however, be proved, though the omission to state it would be ground of objection.

(2) Keigwin, *Cases in Common Law Pleading*, 277-278 (1934): "As the result of these necessary differences in wording and mode of statement, [in declaring upon cases differing in nature], the declarations in the various forms are distinguishable by certain words and phrases which are characteristic of the several actions wherein such expressions are naturally and usually employed. Conventional formulas of this kind are the words force and arms in Trespass, undertook and promised in Assumpsit, whereby an action has accrued in Debt, and the averments of losing and finding in Trover.

"These frequent forms of wording, thus characterising the various actions, are manifestly of much practical convenience and serve at least this useful purpose, to identify the action intended and to assure the reader what kind of a case is proposed. While for these reasons desirable, such words are not, for these reasons alone, necessary; and even where some such language is requisite to suggest a material fact, as the *vi et armis* in Trespass, the requisite fact may be stated in words of equivalent effect. Although some learned writers, and even some judges who have never had to make practical use of common law pleading, have supposed that such formal phraseology as has been mentioned is a necessary feature of the formulary system, the discriminating student will perceive that these verbal casts, while useful, are not essential to that system, and not even necessary, if other forms of expression are preferred."⁵

⁵ Cf. Keigwin, *Cases in Code Pleading*, 191 (1926): "The variant diction which is characteristic of the various forms of action is not of arbitrary institution but inevitable in the use of language to describe different states of fact."

SECTION 2. THE FUNCTIONS OF THE
ORIGINAL WRIT

STEPHEN, PLEADING

5th American edition, 1845. *5-*8.¹

Anciently it was essential to the due institution of all actions in the Superior Courts, that they should commence by *original writ*; in the case of real and mixed actions this is still necessary. But in personal actions the use of original writs is abolished by the recent statute 2 Will. IV. c. 39.²

The *original writ* (breve originale) is a mandatory letter issuing out of the Court of Chancery, under the great seal, and in the King's name, directed to the sheriff of the county where the injury is alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him to command the defendant to satisfy the claim; and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance.³

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity, but others are of later origin, and their history is as follows. The most ancient writs had provided for the most obvious kinds of wrong; but in the prog-

¹ The footnotes, except those in brackets, are those of the editor of this edition; those of the author have been omitted.

² Formerly an action was commenced in the King's Bench or Common Pleas, either by *original writ* or by *bill*; in the Exchequer, by *bill* only. Of these methods of proceeding, the former was the regular and ancient one; and the latter was in the nature of an exception to it. The proceeding by *original writ* consequently claimed the first notice of the author in his editions prior to the late statutory changes in England. The view of the proceeding by *bill* is wholly omitted in his two last editions.

³ One object of the original writ, therefore, was, to *compel the appearance* of the defendant in court; but it was also necessary, as *authority for the institution of the suit*; for it was a principle (subject only to the exception introduced by the practice of proceeding by *bill*,) that no action can be maintained in any Superior Court, without the sanction of the king's original writ; the effect of which was, to give cognizance of the cause to the court in which it directed the defendant to appear. To sue out an original writ, was, consequently, the first step taken in the suit. It was the business of the plaintiff to sue it out, and he obtained it, as a matter of course, upon payment however to the king of a *fine* proportionate to the amount of the demand in the action. [Cf. Martin, *Civil Procedure at Common Law*, 10 (1905): "The original writ from very early times served three very material purposes: it defined and determined concisely the form of the action; it gave the court in which the defendant was required to appear jurisdiction of the action, and it enjoined or enforced his appearance."]

ress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise. Therefore, by the statute of Westminster 2, 13 Ed. I. c. 24, it was provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a *like case* (in consimili casu) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament," &c. This statute, it will be observed, while it gives to the officers of the Chancery, the power of framing new writs in *consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases *entirely new*. It seems, therefore, that for any case of that description, no writ could be lawfully issued, except by authority of parliament. But on the other hand, new writs were copiously produced, according to the principle sanctioned by this act, *i.e.* in consimili casu, or upon the analogy of actions previously existing; and other writs also, being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of *brevia originalia*.

All forms of writs once issued, were entered from time to time, and preserved, in the Court of Chancery, in a book called *The Register of Writs* which in the reign of Hen. VIII. was first committed to print and published. This book is still in authority, as containing, in general, an accurate transcript of the forms of all original writs as then framed. It seems, however, that a variation from the Register, is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness.

An original writ (as already stated) was formerly essential in every case, to the due institution of the suit.⁴ These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are even now considered as within the scope of judicial remedy, in the English law, but those to which some known original writ (when these

⁴[*Of. P. B & W. R. R. Co. v. Gatta*, 27 Del. 38, 44, 85 A. 721 (1913): "The methods by which actions at law are instituted in those American jurisdictions that derive their jurisprudence from the common law, have as their original the method of commencing actions at common law."]

instruments were in universal use) would have applied, or for which some new original writ, framed on the analogy of those already existing, might, under the provisions of the Statute of Westminster 2, have been lawfully devised. The enumeration of writs, and that of actions, have become, in this manner, identical.

WRIT IN TRESPASS FOR ASSAULT AND BATTERY

Sutton, *Personal Actions at Common Law*, 19 (1929).

George IV, etc. to the sheriff of ———, Greeting. If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges, C. D., late of ———, yeoman, that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to show wherefore, with force and arms, at ——— aforesaid he made an assault upon the said A. B. and beat, wounded and illtreated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said A. B. and against our peace: and have you there the names of the pledges and this writ.

Witness ourself, etc.

NOTE

Sutton, *op. cit. supra*, at 20: "The writ of trespass was one of the most frequent and, historically, most important, and could be adapted to the various wrongs. The above is an instance of a writ for assault, which was a trespass to the person; another could be framed for trespass to land or, as it was called, *quare clausum fregit*, by which the defendant was attached to show wherefore,

'with force and arms he broke and entered the close of the said A. B. situate and being in the Parish of———in the County of———and with his feet in walking trod down and trampled upon, consumed and spoiled the grass and herbage of the said A. B. there growing and being of great value,' etc., and a similar writ was in existence for trespass to goods."¹

KENLEE CORPORATION v. ISOLANTITE, INC.

Court of Chancery of New Jersey, 1946. 137 N. J. Eq. 459, 45 A.2d 500.

BIGELOW, V. C. Complainant owns premises in Belleville which are in the possession of defendant under a lease for a

¹ Cf. Scott & Simpson, *Cases on Judicial Remedies*, 75 (1938): Trespass "lies in four classes of cases, and has therefore four subdivisions: 1. Trespass to the person. 2. Trespass to goods, called Trespass *de bonis asportatis* where there has been an asportation (*i.e.*, carrying away) of the chattels. 3. Trespass to land, called Trespass *quare clausum fregit*. 4. Trespass for enticing away a servant, called Trespass *per quod servitium amisit*." See Admiralty Commissioners v. S. S. *Amerika*, *infra* p. 274.

term of years, made by complainant's predecessor in title. The bill charges that the defendant has failed to keep the demised building in repair and has suffered it to become dilapidated. A decree is prayed that defendant pay thrice the damages to be assessed for the waste and that defendant shall lose the premises and its tenancy be terminated. On filing the bill, counsel moved that a writ of waste¹ issue pursuant to R. S. 2: 79-3,

"Any person may have a writ of waste out of chancery against any person holding by dower, curtesy, or otherwise, for life, for a term of years, or other term, as well as against guardians; and whoever shall be convicted of waste shall lose the thing or place wasted, and shall be liable in thrice the damages assessed against him by a jury."

The section of our revised statutes on which complainant relies is a relic of the Middle Ages, taken from the Statute of Gloucester, 6 Edw. 1, Ch. 5, enacted in 1278. Governor Paterson followed the Statute of Gloucester and other ancient English statutes in drafting An Act for the prevention of waste, which was passed by our legislature March 17, 1795. Pat. 179. His statute has retained a place in our books and with minor changes now appears in Title 2 of our Revised Statutes as Article I of Chapter 79.

It was a principle of the ancient English law, that no action could be maintained in the King's Bench or Common Pleas, without the sanction of the King's *original writ*, which issued out of Chancery, as the *officina justicie* and which gave to the law court jurisdiction of the cause. The writ ran in the King's name and directed the sheriff to command the defendant to appear in the King's Bench or the Common Pleas, as the case might be, there to answer the complaint which was briefly stated in the writ. If the defendant failed to obey, process known as judicial writs issued out of the law court to compel his appearance. See Stephen on Pleading, Chapter I, in which are several specimens of original writs.

In the Colony of New Jersey, the old English practice was pursued. Actions in the law court were begun by original writs which issued out of Chancery. 18 N. J. Archives, 109 to 160. The practice began to change at the close of the Revolution when the legislature directed that actions of debt should be commenced by summons or *capias*, judicial writs which issued out of the law courts. Then, in 1799, it was enacted that "the first process to be made use of in personal actions in any of the courts of this state in cases where the plaintiff is not entitled to bail,

¹ See Martin, Civil Procedure at Common Law, § 155 (1905).

shall be a summons." Pat. 357, now found in R. S. 2: 27-59. It will be noticed that this provision relates only to personal actions, leaving mixed actions to be prosecuted in the old manner. The action of waste was still properly begun by an original writ out of Chancery, since it is a mixed action and not a personal action.² 3 Blackstone, 227. Another mixed or real action was partition. Paterson's revision enacts that certain classes of tenants may be compelled to make partition "by writ of partition in that case to be devised in the Court of Chancery, in like manner as co-partners by the common law have been and are compelled to do, and the same writ to be pursued at the common law." Pat. 250. This enactment was repealed March 27, 1874. See Revision of 1877, p. 1383. The rules of our supreme court still contain provisions relative to the original Writs of Waste, Partition and Dower. Rules 176 to 181.

Section 3 of the Act for the prevention of waste, of 1795, now R. S. 2: 79-3, means by the term "writ of waste" the common law original writ of that name issuing out of Chancery and returnable into the Supreme Court or other law court. Certainly the enactment does not empower Chancery to try the action of waste and to give judgment therein. It gives no support to the bill of complaint. But that does not lead to a denial of the motion for the writ since the writ does not depend upon a bill, or even a petition. An original writ was always granted, as a matter of course, to whoever asked for it and paid the fee.

An action of waste, on the Statute of Gloucester, was already a rarity in Blackstone's day. The usual remedy for waste was an action on the case, a personal action. This was true even though in the action on the case the recovery was confined to single damages, and was not accompanied by a forfeiture of the tenement. *Moore v. Townshend*, 33 N. J. L. 284, 300. I had supposed that at the present time the procedure by writ of waste was entirely obsolete, but Mr. Brearley of the Supreme Court Clerk's Office, who kindly searched his files at my request, found three precedents,—*Moorehouse v. Cotheal*, 1847, (See 22 N. J. L. 430, 521); *Craven v. Molonari*, 1912; and *Burg v. Daskal*, 1936. With the aid of these forms and of Fitz-Her-

² Cf. 1 Chitty, Pleading, *86-*87 (Am. ed. 1809): "Actions are from their subject matter distinguished into *real*, *personal*, and *mixed*. *Real* actions are for the recovery of real property only, and in which the plaintiff, then called the demandant, claims titles to lands, tenements or hereditaments in fee-simple, fee-tail, or for term of life, such as writs of entry, right, formedon, dower, &c. *Personal* actions are for the recovery of a debt, or damages for the breach of a contract, or specific personal chattel, or a satisfaction in damages for some injury to the person, personal, or real property. In *mixed* actions, which partake of the nature of the other two, the plaintiff proceeds for the recovery of some real property, and also for damages for an injury thereto, as in the instance of an action of ejectment or of waste."

bert's *Natura Brevium* (Ed. 1793), counsel has drafted a writ which seems of sufficient value and interest to justify printing in our reports.

THE STATE OF NEW JERSEY TO THE SHERIFF OF ESSEX COUNTY,
GREETING:

WHEREAS, it is provided by the statute of this State, R. S. 2: 79-2, that no tenant for life or years, or for any other term, shall, during the term, make or suffer any waste or destruction of the houses, lands or anything belonging to the tenements demised, without special license in writing making mention that he may do it,

SUMMON ISOLANTITE, INC., a New Jersey Corporation, that it be and appear before our Supreme Court at Trenton on the _____ day of _____, 1946, to show wherefore said Isolantite, Inc., without such special license, hath made and suffered waste and destruction of the houses and lands in the Town of Belleville in said County of Essex, known as No. 98 Terry Street, Belleville, which said Isolantite, Inc., holds for a term of years of Kenlee Corporation, a New Jersey Corporation, under a conveyance and assignment thereof made to said Kenlee Corporation by Profit Sharing Food Corporation, which demised them to the aforesaid Isolantite, Inc., for that term of years; to the disherison of it, the said Kenlee Corporation, and contrary to the form of the statute aforesaid, as it is said. And have you then and there this writ.

WITNESS, his Honor, LUTHER A. CAMPBELL, Chancellor of the State of New Jersey, at Trenton, this _____ day of January, 1946.

Attorney.

Clerk in Chancery.

An original writ is properly issued by the Clerk in Chancery, upon payment of his fee, without any order by the Court. The motion is therefore denied without prejudice to complainant's buying a writ from the Clerk.³

*NOTE ON VARIETIES OF PRESENT METHODS
OF COMMENCING ACTIONS*

Contemporary procedural systems prescribe two methods of instituting an action, the service of a summons and the filing of a complaint with the court in which the action is brought. The

³ For a detailed criticism of the original writ as "a source of considerable expense, embarrassment and delay to the suitor," see First Report of the Commissioners on Courts of Common Law, 79 ff. (1829).

New York Civil Practice Act is typical of those systems which employ the first method and the Federal Rules of Civil Procedure, of those which employ the second.

Section 218 of the New York Civil Practice Act provides that "A civil action is commenced by the service of a summons, which is a mandate of the court," and section 220 authorizes any person, of the age of eighteen years or over, other than a party to the action, to serve a summons, except where it is otherwise specially prescribed by law. It is optional with a plaintiff whether or not he will serve a copy of his complaint with the summons. Rule 45 of the Rules of Civil Practice prescribes the form of the summons. It must, among other things, state the court in which the action is brought and the names of the parties, and it must be subscribed with the name of the plaintiff's attorney and with his office address. In addition, it is required to be in substantially the following form: "To the above named defendant: You are hereby summoned to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint." This rule embodies the requirements of section 237 of the Civil Practice Act with respect to the time and manner of the defendant's appearance, except that that section also permits the defendant to appear by a notice of motion raising an objection to the complaint in point of law. If a copy of the complaint is not served with the summons, then according to section 238 of the Civil Practice Act a notice of appearance entitles the defendant only to notice of the subsequent proceedings unless with the notice he demands a copy of the complaint. However, section 257 permits the demand to be made in the notice of appearance.

According to the third and fourth of the Rules of Civil Procedure for the District Courts of the United States, a civil action is commenced by filing a complaint with the court. Upon the filing of the complaint the clerk is required to issue a summons and deliver it for service to the marshal or to a person specially appointed by the court to serve it. The summons must be signed by the clerk, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney and the time within which the Rules require the defendant to appear and defend, and notify him that if he fails to do so judgment by default will

be rendered against him for the relief demanded in the complaint. Rule 12 (a) requires a defendant to serve his answer within twenty days after the service of the summons and complaint upon him unless the court directs otherwise.

SECTION 3. NO WRIT, NO RIGHT

ADMIRALTY COMMISSIONERS v. S. S. AMERIKA

House of Lords, 1916. [1917] A. C. 38.

APPEAL from an order of the Court of Appeal in so far as it affirmed an order of the President of the Probate, Divorce, and Admiralty Division.

On October 4, 1912, His Majesty's submarine B 2 was run into and sunk in Dover Strait by the steamship *Amerika*, and all the crew of the submarine, except one officer, were drowned, namely, an officer and fifteen sailors of the Royal Navy.

In an action for damage by collision instituted by the appellants, the Commissioners for executing the office of Lord High Admiral of the United Kingdom, against the respondents, the owners of the steamship, in the Probate, Divorce, and Admiralty Division, the respondents admitted that the *Amerika* was alone to blame for the collision, and agreed to pay to the appellants 95 per cent of their damages, to be assessed by the Admiralty Registrar assisted by merchants. Among the items of damage claimed by the appellants was a sum of 5140*l.* representing the capitalized amount of pensions and grants payable to the relatives of the men who were drowned. These pensions and allowances were granted under statutory authority according to scales authorized by Orders in Council and prescribed by the King's Regulations.

The Assistant Registrar disallowed the claim, but assessed at 4100*l.* the sum which the appellants ought to recover if the claim was recoverable at law.

The report of the Assistant Registrar was affirmed upon this point by the President, and the order of the President was affirmed, so far as regards the question under appeal, by the Court of Appeal (Buckley, L. J., Kennedy, L. J., and Scrutton, J.) on the principle laid down by Lord Ellenborough in *Baker v. Bolton* [1 Camp. 493], that "in a civil court the death of a human being could not be complained of as an injury." . . .

Dec. 19. EARL LOREBURN. My Lords, in my opinion this appeal fails. It is far too late for this House to disturb the rule expressed by Lord Ellenborough in *Baker v. Bolton* [*supra*],

even were we of opinion that the common law ought originally to have been differently interpreted, of which I am by no means persuaded. When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it. I also think that the damages sought are not in any way recoverable, because they represent sums of money which the appellants were not legally required to pay.

Your Lordships have been interested in ascertaining the origin of Lord Ellenborough's decision. I share in that interest, but I cannot throw any light on the subject beyond what may be derived from the opinions of Lord Parker and Lord Sumner, both of which I have had the advantage and the pleasure of reading.

LORD PARKER OF WADDINGTON. My Lords, I agree. There are in my opinion two sufficient reasons why this appeal cannot succeed. The first is that the items of damage which the appellants desire to be allowed are too remote. The second is that no sufficient case has been made for overruling Lord Ellenborough's decision in *Baker v. Bolton* [*supra*] to the effect that in a civil court the death of a human being cannot be complained of as an injury. I will deal with each of these reasons separately.¹ . . .

Passing to the second of the reasons above mentioned, I may point out that the correctness of the ruling in *Baker v. Bolton* has since been accepted, not only by all Courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it. It was, it is true, severely criticized by Lord Bramwell in *Osborn v. Gillett* [L. R. Ex. 88]. It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A. whereby he is prevented from fulfilling his contractual obligations to B. should confer on B. a right of action only where these

¹ Lord Parker's discussion of the first of these reasons is omitted.

obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise.

This House, however, is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision. The appellants have accordingly attempted to show that Lord Ellenborough's ruling was erroneous, as being based either (1.) upon a misconception of the limits within which the maxim *actio personalis cum persona moritur* is applicable, or (2.) upon the mistaken notion that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, precluded such civil remedy altogether, or (3.) upon doctrines of Roman law which ought not to be applied at all. It is to be observed that Lord Ellenborough gave no reasons for his ruling: he treated the proposition he laid down as a well-known proposition of law, and the reasoning on which the proposition was based must therefore be found, if at all, in the earlier authorities. The only earlier authority to which your Lordships' attention was called was the case of *Higgins v. Butcher* [Noy, 18; Yelv. 89]). This was an action in trespass by a husband for wrongful injury causing his wife's death. The action was dismissed. If it were looked on as an action in right of the deceased wife, the maxim *actio personalis*, &c., was clearly applicable. If on the other hand it were looked on as an action by the husband in his own right, then the trespass was "drowned in the felony." Obviously the limits within which the maxim mentioned is applicable were already well known when *Higgins v. Butcher* was decided, and Lord Ellenborough with that case in his mind can hardly have fallen into the error suggested. Nor can I find any reason to suppose that any weight has ever been given in the Courts of this country to the Roman law on the subject. It remains, therefore, to consider whether the reason given in *Higgins v. Butcher* that the trespass was drowned in the felony can be rejected as erroneous. It was contended that the reason must be rejected as a misconception of the rule of public policy above referred to. Whatever may have been thought in the early part of the seventeenth century, or even in Lord Ellenborough's day, it is now quite clear that the rule only suspends and does not require the destruction of the civil remedy. There can therefore, it is argued, be no drowning of the trespass in the felony, and if the reason given for the de-

cision in *Higgins v. Butcher* be bad, there is, it is contended, no reason why that case should stand, or why Lord Ellenborough's ruling, which was dependent on it, should not now be overruled by this House.

My Lords, before proceeding to deal with this point I should like to call the attention of the House to certain historical considerations which appear to me to be of considerable materiality. I do this with some diffidence, as I cannot lay claim to any special knowledge. I have, however, read a good deal of history in connection with this case, for it is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth.

If we carry our minds back to a period prior to the development under the influence of the Statute of Westminster the Second (13 Edw. 1, c. 24) of the action on the case, we find that the law of contract based on the doctrine of consideration had not yet taken shape. The basis of society was still status rather than contract,¹ and the King's Courts had not yet invented any procedure for the enforcement of simple contract obligations. Nevertheless, among the writs which had become *de cursu*, there were several writs which a master could obtain from the Chancery in respect of wrongs done to his servant. Fitzherbert in his *De Natura Brevium* mentions (1.) a writ of trespass for taking away an apprentice or servant, and (2.) a writ of trespass for injury done to a servant *per quod servitium amisit*. These writs are in all respects analogous to the writs of trespass for taking away a wife or child, or for injury done to a wife or child *per quod consortium* or *servitium amisit*, and also to the writs of trespass for debauching a wife, daughter, or female servant.² The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract. This would appear

¹ Cf. Maine, *Ancient Law*, 181-182 (New ed. 1930): "The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."

² Cf. Shipman, *Common Law Pleading*, 68-69 (3d ed. 1929): "If a man's wife, daughter or servant is assaulted, beaten or imprisoned, there is a forcible injury to the man's relative rights, for which he may maintain trespass. Where a wife, daughter, or servant is enticed away, or seduced or debauched, even with her or his consent, the law implies force, and the husband, father, or master may maintain trespass against the wrongdoer."

to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an injury whereby B. is unable to perform his contract is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical.

Further, during the period in question the writ of trespass was the only remedy for wrongs such as those we are considering. According to Professor Maitland, trespass was a remedy for acts of violence not amounting to a felony.³ Certainly no writ of trespass can be found in which the acts of which the plaintiff complains necessarily amount to a felony. In some cases they may or they may not. Take for example the writ for breaking into the plaintiff's house and taking away his money. The acts complained of do not constitute burglary or larceny. There may be a burglary or larceny, according to whether certain additional facts be or be not proved, but the defendant cannot plead these additional facts: *Lutterell v. Reynell* [(1670) 1 Mod. 282]. He cannot set up his own felony by way of defence. The facts alleged in the writ are wrongful and actionable, whether these additional facts be proved or otherwise. It is not the felony which is made the subject of complaint. It should be remembered that for felony there was the appeal, and that, to use Professor Maitland's expression, the writ of trespass may be called "an attenuated appeal" dealing with acts of violence for which the appeal did not lie. It arose out of the appeal, and was a criminal as well as a civil proceeding, leading not only to the plaintiff recovering damage, but to the defendant being fined or imprisoned.

My Lords, during the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly intentional homicide or homicide through negligence was felonious. It follows that the death of a human being occasioned by an act of violence on the part of the defendant could not be the ground of complaint in an action of trespass. It could not be alleged without alleging felony, and for felony trespass would not lie. If the writ alleged only an injury per quod servitium or consortium amisit, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only. If the injured person had been killed on the spot the action would fail altogether. The plaintiff's remedy, if he had any, would be the appeal.

My Lords, if for the reasons above suggested trespass did not lie on the part of a master for an injury causing the death

³ See Maitland, *The Forms of Action at Common Law*, 48-50 (1941).

of his servant, it is easy to see how this fact would influence the subsequent development of the action on the case. The writ-making powers of the Chancery, which for a time had fallen into disuse largely because they were thought to infringe on the legislative function of Parliament, received in 1285 A. D. a new impulse by the passing of the Statute of Westminster the Second, and began to be again used, as they had been originally used, to meet the needs of a growing civilization by providing legal remedies for grievances which, however much they might be recognized as such by the general sense of the community, were not yet actionable in the King's Courts. Consider for a moment the following examples: First, A.'s servant, in the course of serving A., negligently throws a beam of wood on to a highway, and in so doing injures B.'s servant. Under these circumstances B.'s servant had a writ of trespass against the wrongdoer, and B. also had a writ of trespass (*per quod servitium amisit*), but neither of them had any remedy against A. for trespass was in fact a criminal proceeding, and according to the common law no one could be called upon to answer in a criminal proceeding for another's crime. Nevertheless, the general sense of the community demanded such a remedy, and this was supplied by giving B. and B.'s servant an action on the case against A. By this means the modern law as to a master's liability for the acts of his servant was enabled to develop. The remedy of B.'s servant against A.'s servant was always confined to an action in trespass: see *Holmes v. Mather* [(1875) L. R. 10 Ex. 261, 268], per Lord Bramwell. Secondly, suppose A.'s servant, in the course of serving A., placed a beam of wood on the highway and negligently left it there, so that B.'s servant fell over it and was injured. Under these circumstances neither B.'s servant nor B. himself had any remedy in trespass, for A.'s servant had committed no act of violence, for which alone a writ of trespass could be obtained from the Chancery. Nevertheless, the general sense of the community demanded a remedy, and such a remedy was again supplied by giving both B. and B.'s servant an action in case against both A.'s servant and A.

If in the first of the two examples I have given B.'s servant had been killed and not injured only, A.'s servant would have committed a felony and no action against him would lie in trespass. In developing the principle of *respondeat superior* it may well have been thought that A.'s liability for the act of his servant ought not in any case to be greater than the liability of the servant himself. Again, if in the second of the two examples B.'s servant, in falling over the beam, had broken his neck, it may well have been thought that neither A.'s servant nor A.

himself ought to incur, by reason of mere nonfeasance, a liability greater than would have been incurred by actual violence. These considerations may well account for the doctrine that the death of a human being could not be complained of as an injury in an action on the case any more than it could in an action of trespass.

My Lords, I will now return to the case of *Higgins v. Butcher*, and I desire to suggest that it was not really based on any rule or supposed rule of public policy, but merely on the nature of an action in trespass. The declaration was by a husband for an injury to his wife. Prima facie, therefore, what was complained of was a trespass, but the declaration proceeded to state that the wife died of the injury. What was prima facie a trespass thus became a felony for which no action in trespass lay. The trespass was drowned in the felony. "For the King only is to punish felony, except the party brings an appeal." [Noy, 18]. If the case had turned on a rule of public policy, such rule would have been applicable to a writ in trespass for breaking into the plaintiff's house and taking away his money, where what had been done in fact amounted to burglary or larceny. I cannot discover that it was ever so applied. On the contrary *Markham v. Cob* [Latch, 144; Noy, 82], decided in 1625, and *Dawkes v. Coveeneigh* [Sty. 346], decided in 1652, are authorities that in such a case the trespass is not drowned in the felony, so as to preclude an action for the trespass, provided the requirements of public policy are first satisfied. These cases were quoted with approval by Sir Matthew Hale (1 Hale, Pleas of the Crown, p. 546), and it cannot be disputed that they are good law.

It should be noticed that Baggallay, L. J., in laying down in *Ex parte Ball* [(1879) 10 Ch. D. 667] the propositions resulting from the authorities, says that a felonious act *may* (not that it *must*) give rise to a civil action. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings.

My Lords, it was in this state of the law as to public policy that *Baker v. Bolton* came up for consideration before the Court of Appeal in *Clark v. London General Omnibus Co.* [(1906) 2 K. B. 658], and if that case be referred to it is quite apparent that neither the counsel who argued it nor the judges who were

party to the decision considered that public policy had anything to do with the matter. Not one of the cases on the latter subject to which I have referred was so much as mentioned. Under these circumstances it seems impossible to suppose that the decision in either *Higgins v. Butcher* or *Baker v. Bolton* depended on a misconception of the rule of public policy. I think it more probable that this misconception, which at one time no doubt prevailed but which has been now dispelled, was itself due to a mistake as to the meaning of what was said in *Higgins v. Butcher*, that case itself merely deciding that felony could not be made a ground of complaint in trespass, a decision which in *Baker v. Bolton* was extended to cover all civil proceedings. . . .

My Lords, under these circumstances I do not think the appellants can be said to have advanced any sound reasons why your Lordships' House should disturb a rule of law which has been so long recognized in our Courts, and which, however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds.⁴

I agree that the appeal fails.⁵

HOLDSWORTH, HISTORY OF ENGLISH LAW

3d ed. 1927, iii, 429-434.*

In the second half of the fourteenth century the rule was established that a liability in tort arose when one person had caused damage to another by the manner in which he had fulfilled a duty which he had undertaken (*assumpsit*) to perform.

⁴ In his concurring opinion, which is omitted, Lord Sumner explained the rule on somewhat different historical grounds, which are indicated by the final paragraph of his opinion: "I think the history of the disappearance of wergild and the persistence of the appeal for homicide, which is to be found in full in the works of Hawkins, Fitzjames Stephen, and Pollock and Maitland, proves, if proof were needed, that Lord Ellenborough's canon correctly states the law and is one which is not now susceptible of expansion by judicial interpretation. There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such action at law been possible, for it was long a form of legalized blackmail."

⁵ See the criticisms of this decision in 3 Holdsworth, *A History of English Law*, 676 (3rd ed. 1927). Cf. Sutton, *Personal Actions at Common Law*, 29-30 (1929): "In theory an original writ was essential to the institution of the suit, with the result that these instruments had the effect of limiting and defining the cause of action itself, and no cases were considered as within the scope of judicial remedy in English law but those to which the language of some known writ was found to apply or for which some new writ could be framed either under the express provisions of some statute, or on the analogy of those already in existence under the provisions of the Statute of Westminster II. You will be convinced by the speeches of Lord Parker and Lord Sumner in *The Amerika* . . . that the now unquestionable rule of English law that the death of an individual gives no right of action to any one is due to this principle."

* By permission of Little, Brown & Company, publisher. The author's footnotes are omitted.

This liability was enforced by the special variety of trespass or deceit on the case which came to be known as the action of assumpsit. . . . The principle of these cases was well summed up by Newton in 1436. "If a carpenter," he said, "makes a covenant with me to make me a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass on my case. So if a smith makes a covenant with me to shoe my horse well and properly and he shoes him and lames him, I shall have a good action. So if a doctor takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have action on my case. So if man makes a covenant with me to plough my land in seasonable time, and he ploughs in a time which is not seasonable, I shall have action on my case. And the cause is in all these cases that there is an undertaking and a matter in fact beyond the matter which sounds merely in covenant. . . . In these cases the plaintiffs have suffered a wrong." Similarly deceit upon the case lay where a man expressly warranted a thing sold, and the thing proved to be other than as warranted, to the damage of the plaintiff. "If," said Brian, "a man sells me seed and warrants it good, and it is bad, or warrants that it is seed of a certain county, and it is not, I shall have action of deceit." It may be that a vendor who sold goods knowing that he had no title to them was liable without express warranty in action for deceit. But apart from this, unless the vendor was under a public duty by virtue of his calling to warrant the quality of the goods sold, he was not liable in the absence of an express warranty. If the purchaser was deceived it was his own folly. . . .

In all these cases of trespass or deceit on the case, the ground of action was a tort pure and simple. The plaintiff sued for a physical injury to his person or property or for a fraudulent injury to his rights caused by some active misconduct on the part of the defendant; and, as Ames says, "the gist of the action being tort not contract, a servant, a wife, or a child who is injured may sue a defendant who was employed by the master, the husband, or the father." It is true that in some of these cases there would have been no liability to compensate for the damage caused if there had not been an undertaking; but it was not the breach of the undertaking which was the ground of the action. The ground of the action was the damage caused by a wrongful act. The fact that the defendant had, in these cases, expressly undertaken not to do acts of that class supplied a reason why the act was wrongful. It did not make the undertaking the ground of the action. . . .

It is clear that many of these cases are capable of being regarded as breaches of contract—we at the present day would think it the most natural way to regard them. As Newton said in *Somerton's Case*, "This is a writ of trespass on the case, but it sounds in a manner in covenant." We have already seen that one of the most usual defences to such actions was the defence that the action was for breach of contract, and therefore should have been brought by writ of covenant. It was not difficult, however, to decide in the class of cases which I have just discussed that an active misfeasance, though it was in breach of an undertaking, was sufficient to give rise to a liability in tort. But the same reasoning, as Cotesmore and Martin pointed out in *Somerton's Case*, does not necessarily apply to a mere non-feasance. If I undertake to act, and omit to act to the damage of the other party, can it be said that I have done anything which will be sufficient to make me liable to an action of trespass or deceit on the case? In Henry IV.'s reign this distinction was clearly seen, and it was held that there was no liability where the damage was caused merely by non-feasance. The report of the earliest of these cases runs as follows: "Laurence Wotton brought a writ on his special case against Thomas Brinth which ran as follows: Whereas the said Thomas had undertaken at Grimsby well and faithfully to rebuild certain houses of the said Laurence within a certain time, nevertheless the said Thomas has neglected to rebuild the houses of the said Laurence within the aforesaid time, to the damage of the said Laurence £10. *Tirwit*.—Sir, you see well how that he has counted of a covenant, and offers no evidence of the covenant—judgment. *Gascoigne*.—Now that you answer nothing we demand judgment and pray our damages. *Tirwit*.—This is simply a covenant. *Bryn*.—So it is; and yet if he had counted, or in the writ mention had been made, that the work had been begun and then by negligence not finished, it would have been otherwise. . . . *Rikhill, J.*—Seeing that you have counted on a covenant and offered no evidence of it, take nothing by your writ and be in mercy." So in another case of the same reign, also an action against a carpenter for failure to build a house, Thirning said, in answer to an argument that an action would lie if he had built badly, "Certainly it would lie in that case, because he would then answer for the wrong which he had done, but when a man makes a covenant, and does nothing under that covenant, how can you have an action against him without a deed?" Early in Henry VI.'s reign (1425) the opinion of Martin, J., was to the same effect; and in *Somerton's Case* he insisted on the same distinction. "The plaintiff," he said, "will never have an action for breach of the defendant's undertaking to be of counsel with him without a

deed: the real ground of his action is that the defendant has become of counsel with another."

NOTE

Keigwin, Cases in Code Pleading, 183-184 (1926): "In thus building up, bit by bit, the common law from its slender beginnings, the royal courts formulated for each new right of action added to their jurisdiction a writ adapted to the additional acquisition and embodying the novel principle of law by which their jurisprudence was enlarged. In this way the whole body of the law found expression in the writs: where the substantive law gave a right the registry of the Chancery showed a writ; *e converso*, if there was no writ, that was proof that the law of the land did not afford judicial relief in the case contemplated. This is sometimes expressed by saying that, unless a suitor could bring his case within the crystallised—or (as it is called) Procrustean—wording of some writ, he could not obtain remedy. That is true; but it is evidently only another way of saying that, unless the pleader can allege and prove a state of facts which brings his case within some fixed and limited principle of law, he cannot maintain an action; which is as true today in any common law or in any Code State as it was in England in the thirteenth or any succeeding century. As the common law courts expanded their body of substantive law—by judicial usurpation of jurisdiction before exercised by other courts, by legislative additions and royal warrants, and by development of pre-existing principles—the number of writs multiplied correspondingly, and the forms of action available at common law always precisely measured the rights established by the contemporary jurisprudence."

SECTION 4. THE DOMINANCE OF THE ORIGINAL WRIT

A. The Necessity of Choosing the Appropriate Form

HEPBURN, DEVELOPMENT OF CODE PLEADING

1897. Section 46 *

If a wrong action was adopted, the error was fatal to the whole proceeding, however clearly the facts of the controversy might have been brought before the proper court. The plaintiff may have served his adversary in due time, and may have given as full information as to the material facts of the case as could be given in any other action; he may have proceeded openly and fairly in all matters; there may have been no question as to the substantial justice of his claim; but all this would not avail if his action was not technically the proper one. He must pay

* By permission of H. W. Anderson, publisher.

the costs and go out of court. If he chose he could begin again, but under like conditions. At his peril he must select the appropriate formula. It was not enough that he stood within the temple of justice, he must have entered through a particular door. Or, to change the figure, chancery, the so-called *officina justitiae*, was like an armory. To it every man who would contend with another in the courts comes to choose his weapon. The choice is large. All the weapons of juridical warfare are here. But every weapon has its proper use, and can be put to no other. Moreover, only one weapon can be chosen at a time; and once chosen it can not be exchanged for a different weapon in the progress of the combat. If the fight is to go on, it must be with such a weapon as was first chosen, and according to its special rules. A sword being selected, the rules of sword-play must be strictly followed. A crossbow may not be used as a mace. The issue of the combat must not be determined by mere brute force—not even by the brute force of indisputable facts arrayed before the court. It is a contest of skill; success depends upon observing the formal rules of the combat.¹

KEIGWIN, CASES IN CODE PLEADING

1926. 185-186 *

[E]ach form of action is founded upon some distinct doctrine of the law. . . . And the several forms of action are distinguished from each other in that each proceeds upon a particular legal principle asserted by the plaintiff as the fundamental predicate of his case.

For this reason the whole body of writs available at any given time measured the extent of the substantive law. . . .

For the same reason, the form of action chosen signified—as yet it does in any contemporary common law jurisdiction—upon what theory of law the plaintiff proceeded, what legal principle he conceived as applicable to the state of facts alleged,

¹ Cf. Keigwin, *Cases in Code Pleading*, 199 n. 5 (1926): "So acute a thinker as Mr. Hepburn must have perceived, upon very slight reflection, that the forms of action are differentiated, not by any merely verbal formulas, but by their adaptation to various principles of law and to various theories of the plaintiff's right; the formulary system is simply the common law expression of the theory of the case doctrine. A very rational man may have reasons satisfactory to himself for objecting to the rule requiring adherence to a theory of the case; but that is a different thing from saying that forms of action consist merely of arbitrary modes of diction: if the theory of the case doctrine is erroneous, the forms of action ought to be discarded, not because they are artificial, but because they embody that doctrine."

* This and all other extracts from this book quoted herein are included by permission of Emma Lilian Keigwin, executrix of the author, and The Lawyers Co-operative Publishing Co., the publisher.

upon which of perhaps several possible rights he elected to stand. . . .

In this way, in the modern common law jurisdictions, the form of action adopted imports the fundamental predicate of law to which the pleader appeals as affording him relief, and identifies the legal theory which he conceives as applicable to his case. If trespass be selected, the plaintiff designates one primary tort as the grievance entitling him to redress, though other tortious acts—as conversion of goods—may be alleged by way of aggravation; if the action is in trover, the grievance is a tort of another kind; and though a trespass may appear in proof, the damages are sought upon a doctrine having no relation to the law of trespass. The forms of action, therefore, differ not merely in the phraseology and literary pattern of the pleadings—which features are important only as they signify differences of legal doctrine—but in that they express different principles of the substantive law. And these differences are not merely in respect of external form and appropriate diction; they are inherent in the nature of the various subjects of litigation and in the diversities of legal principle. *

KEIGWIN, CASES IN COMMON LAW PLEADING

2d ed. 1934. 21-23 *

The jurisdiction of the court being limited to the identical case proposed in the original writ and developed by the declaration, the case established by the pleadings and the proof must conform in character to that thus presented. And such conformity must exist, not only in respect of the facts alleged, but also in respect of the legal principle invoked. As to matters of fact, it has been shown that the proof must accord with the allegations; thus a plaintiff who sues on account of a horse cannot, if he fails to prove the horse, succeed by showing a good cause of action for a steer. Such a discrepancy between the pleading and the evidence constitutes a variance, which occurs because the party has mistaken the actual state of facts or his ability to prove it as he alleges it.

Likewise a plaintiff, though knowing the facts and able to prove them, may mistake the legal effect of such facts and the legal doctrine applicable to them. Thus, he may suppose that the conduct of the defendant amounts to a trespass when, as matter of law, the wrong done actually creates a debt or amounts

* This and all other extracts from this book quoted herein are included by permission of Emma Lilian Keigwin, executrix of the author, and The Lawyers Co-operative Publishing Co., the publisher.

to no more than a simple conversion without a trespass. If in such error the party should sue in the form of Trespass, stating a case within the law applicable to trespasses, it would be a palpable departure from procedural principle to permit a recovery for the debt or the conversion proved. In that situation the action must fail for this (if for no other) reason, that the pleader has, by the form wherein he states his case, invoked the principle of law which relates to trespasses whereas his right to redress is really referable to an entirely and essentially distinct doctrine of law. Hence the actual case established is in legal character different from that proposed in pleading. . . .

The error committed by suing in a form of action which expresses a theory of law not available in the case as stated and proved is called a misconception of form. This is regarded as a very substantial solecism, since the courts have always been concerned to preserve the distinctions between the actions, which is only an observance of the difference between the distinct doctrines of the law. Hence such a misconception of the true ground whereon a plaintiff is entitled to redress will preclude recovery, although had the case been framed in accordance with a proper understanding of legal principle, he might have succeeded.¹

EDMANDS v. OLSON

Supreme Court of Rhode Island, 1939. 64 R.I. 39, 9 A.2d 860.

Moss, J. This case is before us on the plaintiff's exceptions to decisions by a justice of the superior court sustaining the defendant's demurrers to each of the two counts of the declaration. The action as described in the plaintiff's writ is "trespass causing the death of plaintiff's decedent by wrongful act." The introductory paragraph of the declaration describes the action as "an action of trespass for running or driving an automobile against the plaintiff's said decedent or testate causing his death by wrongful act."

The gist of the first count is that the defendant, "with force and arms, a violent assault in and upon the body of the said plaintiff's decedent or testate did then and there commit, and him the said decedent or testate did beat, bruise, wound and evil entreat", thus "by the aforesaid wrongful act of the said defendant", causing "the death of the said decedent or testate."

The gist of the second count is that the defendant, "with force and arms, drove or ran an automobile with great force

¹ Cf. Keigwin, *op. cit.*, at 15: "A variance may be committed in either of two ways: (1) By stating in the declaration a cause of action materially different from that embodied in the writ; or (2) By proving at the trial a state of facts different from that alleged in the pleadings of the party making such proof."

and violence into and against the body of the said plaintiff's decedent or testate, and him the said decedent or testate did cut, bruise, wound and evil entreat", concluding as in the first count.

The demurrer to each count sets forth the same four grounds, the first and fourth grounds being based on substantially the same contention, viz., that the count fails to set forth a cause of action for death by wrongful act, but only "sets forth a cause of action of trespass with force and arms which cause of action does not survive where death results." The second and third grounds of demurrer are based on the contention that each count is too vague, indefinite and uncertain because it does not state whether the defendant's wrongful act, which is complained of, was intentional or negligent. The demurrer to each count was sustained on all four grounds.

The action was brought under general laws 1923, chapter 333, sec. 14, now general laws 1938, chapter 477, § 1. This statute does not provide for any special form of action, but the gist of it, for our present purposes, is as follows: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Since no special form of action is provided by the statute, it is our opinion that under it the same form or forms of action may be employed by the person or persons entitled to bring an action under the statute as could properly have been employed by the deceased, if he had not died. *Union Ry. & Transit Co. v. Shacklet*, 119 Ill. 232; 5 Enc. Pl. & Pr. 849; *Read v. Dunn*, 48 R. I. 437; *Id.*, 137 A. 9, and cases therein cited. . . .

So far as we have been able to ascertain, this rule has been consistently followed in this state. According to it, all that is necessary for a good declaration under such a statute is that it should contain allegations which, if the person deceased were still living, would state a good cause of action by such person against the defendant for personal injuries caused by the act, neglect or default of the defendant; and that it should also contain allegations that such person died as a result of such act, neglect or default and that the plaintiff is the administrator of the estate of the deceased or is otherwise a person entitled to bring such an action under the statute.

The next question for consideration is what form or forms of action could have been employed by the plaintiff's decedent, Frederick W. Edmands, if he had not died as a result of the personal injuries to him, complained of in the plaintiff's writ and declaration, but were still living. Those injuries are therein stated to have been inflicted upon him by the *wrongful act* of the defendant in running or driving an automobile against him.

This act is not alleged to have been done by a servant or agent of the defendant and the implication is clear that it was charged to be the act of the defendant personally, by which force was *directly* applied to the body of the decedent.¹ It is well settled in this state, as well as elsewhere, that in such a case the injured person *may* bring an action of trespass,² whether the direct application of force by the defendant was intentional or negligent, and can bring *only* an action of trespass, if the direct application of force was intentional.

The correct rule is thus stated in *McKendall v. National Wholesale Confectionery Co.*, 50 R. I. 424, 148 A. 315: "The settled rule in this state is that where the injury is the effect of force, direct and intentional, the action must be in trespass and not on the case; where the injury is the effect of negligence, though the force be direct or immediate, the plaintiff has an election to sue either in trespass or in trespass on the case."³ This follows closely the opinion of this court in *Brennan v. Carpenter*, 1 R. I. 474.

¹ Cf. *Sharrod v. London & North Western Railway Co.*, 4 Ex. 580, 584 (1849): "The maxim 'Qui facit per alium facit per se' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the Court in *Morely v. Gainsford*, 2 H. Bl. 442, the act was done 'by his command.' . . . [W]hen the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper. . . ."

² Cf. *Martin*, Civil Procedure at Common Law, 69 (1905): "The term *trespass*, in an enlarged sense, includes every voluntary transgression or wrong. But the action which goes by that name lies only for the redress of wrongs committed with violence, either actual or implied, against the person or against tangible and corporeal property, whether personal or real. The wrong inflicted must be the direct effect of the act complained of and not merely the consequence of it. . . . An assault of the person by the use or offer of violence is an example of actual violence. A peaceable but wrongful entry upon land is an example of implied violence."

³ Cf. *Martin*, *op. cit.*, at 78-79: "Trespass on the case, commonly called *case*, is the generic name of an action to recover damages for an injury to one's rights in respect of his person, or the person of others in whom he has relative rights, in respect of his health, reputation, privacy and domestic comfort, or in respect of his property, real or personal, caused by the wrongful act of another, *unaccompanied with force actual or implied*; or when the injury to said rights is the *indirect* or *secondary* effect of a wrongful act *accompanied* with force actual or implied."

We are of the opinion, therefore, that if the plaintiff's decedent, Edmands, were still living, but otherwise the facts as to injuries inflicted on him by the defendant were the same as are alleged in the declaration in the instant case, he, Edmands, could properly have brought an action in the form of trespass. For this reason, we are also of the opinion that the plaintiff, as the executrix of his will, could properly bring an action in the form of trespass, whether the application of force by the defendant was intentional or merely negligent. This is in accordance with the opinion of this court in *Read v. Dunn, supra*.

Hence it is our conclusion that the justice of the superior court who sustained the demurrer to the plaintiff's declaration was not justified in so doing upon the first or fourth ground of demurrer.

The strongest contention that the defendant's attorneys have made in support of the second and third grounds of demurrer is that it is not specified in either count of the declaration whether the conduct of the defendant in driving his automobile against the plaintiff's decedent was intentional or merely negligent.

It is our opinion that the same rule which we have already applied, with reference to the former contention that an action of *trespass* cannot be brought under the statute, should also be applied with reference to this latter contention. Restated, with special reference to this latter contention, the rule is that in a declaration under the statute to recover for the death of a person caused by the wrongful *act* of the defendant, such act need not be alleged any more fully or precisely than would have been necessary, if the injured person had not died but had brought the same form of action to recover for his injuries.

The question then is narrowed to this one: In an action of trespass to recover damages for personal injuries caused to the plaintiff himself by wrongful conduct of the defendant in directly applying force to the plaintiff's body, is the plaintiff required to specify in his declaration whether the defendant's wrongful conduct was intentional or only negligent? We have not been able to find any Rhode Island case which is of any real assistance to us in deciding this question. . . .

In the text books dealing with pleadings in declarations in different forms of action we have not found any support for an affirmative answer to this question and much support for a negative answer. See Stephen on Pleading, (Andrews ed.), 81, 2 Chitty on Pleading, (16th Am. ed.), 612, and Oliver's Precedents, (5th ed.), 277, for forms recognized as proper in such actions of tres-

pass. In the last of these citations what appears to be the gist of a standard common-law form for a declaration for assault and battery is set forth thus: "For that the said D on etc., at etc., with force and arms, in and upon the plaintiff, made an assault, and him then and there beat, bruised, wounded, and evil entreated" ⁴ Several other forms used in different states are also set forth and not one of them contains any statement as to whether the alleged conduct of the defendant toward the plaintiff was intentional or was negligent.

In this respect the requirements for a declaration in trespass differ from those for a declaration in trespass on the case, as to the latter of which it is stated in 21 Enc. Pl. & Pr. 907 as follows: "The distinguishing characteristic of an action on the case seems to be that all the facts upon which the plaintiff relies must be stated in his declaration."

In 21 Enc. Pl. & Pr. 785, the rule is laid down thus: "Where the act done is, without the intervention of any other act or agent, immediately injurious to the person or property of another, and without or against his consent or agreement, therefore necessarily being accompanied with force, the remedy is trespass *vi et armis*; and it is immaterial whether the injury was or was not committed wilfully." (italics ours after the words *vi et armis*)

So far as we have been able to ascertain, all or practically all the authorities on the subject, under the common law, seem to be in favor of the rule that in order to state a good cause of action in *trespass* for bodily injuries suffered by the plaintiff from the wrongful and *direct* use of force by the defendant upon him, all that is necessary is to set forth and describe such use of force and the resulting injuries to the plaintiff and that it is not necessary for him to state that the defendant's conduct was intentional or that it was negligent. On the other hand, in an action of *trespass on the case* for bodily injuries resulting from negligent conduct by the defendant, the defendant's negligence is of the essence of the action, and the plaintiff must, in his declaration, allege and describe such conduct.

This distinction is well brought out in *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267. There the defendant had violently pushed the plaintiff against a third person, who in self-protection repelled the plaintiff, the result being a bodily injury to the plaintiff. The action was in trespass *vi et armis*. In its opinion, the court says, at page 428 (269): "The first objection that is now insisted upon related to the form of the action. In all cases

⁴ Cf. Martin, *op. cit.*, at 25: "The declaration was originally an expansion of the writ—a more particular and circumstantial statement of the cause of action, which the writ indicated in general terms."

where the injury is done with force and immediately by the act of the defendant, trespass may be maintained; and where the injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election either to treat the *negligence* of the defendant as the cause of action, and declare in case, or to consider *the act itself* as the cause of the injury, and to declare in trespass." (italics ours) See also *Dalton v. Favour*, 3 N. H. 465, and *Blin v. Campbell*, 14 Johns., N. Y. 432.

That it has not been required or customary for the plaintiff in a declaration in an action of trespass *vi et armis* to state that the defendant's act was intentional or that it was negligent seems to us to be quite clear. . . .

Upon consideration of the authorities on this matter, we find that in this state, in which the matter is governed by the common law, the plaintiff in an action of trespass for assault and battery, or for bodily injuries to him, inflicted by the wrongful and *direct* use of force by the defendant upon him, is not required to specify, in his declaration, that the defendant's conduct in such use of force was intentional or that it was negligent.

We have found *supra* that in a declaration to recover, under the statute above referred to, for the death of a person caused by the wrongful *act* of the defendant, such act need not be alleged any more fully or precisely than would have been necessary, if the injured person had not died but had brought the same form of action to recover for his injuries.

From these two findings the conclusion necessarily follows that the plaintiff in the instant case was not required to specify in either count of his declaration that the alleged wrongful act by the defendant was intentional or that it was negligent. It follows that in our opinion the justice of the superior court was not justified in sustaining the demurrer to the declaration upon the second or third ground of demurrer.

The rules of pleading at common law in actions of trespass being somewhat technical, each party in this case should be careful as to the further pleadings, so that it may be fully tried and disposed of on its merits.

The plaintiff's exceptions are sustained, and the case is remitted to the superior court for further proceedings.

NOTES

(1) *Scott v. Shepherd*, 2 Wm. Blackstone 892 (C. P. 1773): Defendant threw a lighted squib, made of gunpowder, into a market-house where there were a large number of people. It fell upon the stand of Yates, who sold gingerbread, etc. One

Willis, to prevent injury to himself and to Yates' wares, instantly took the squib from Yates' stand and threw it across the market-house where it fell upon the stand of Ryal, who instantly and to save his own goods from being injured, took the squib up and threw it to another part of the market-house. The squib struck the plaintiff and, exploding, put out one of his eyes. The question was whether trespass was maintainable. A majority of the court held that it was, although on somewhat different grounds. Nares, J., was of the opinion that the action was maintainable because (i) since the probable consequence of defendant's act was injury to some one the act was unlawful and, hence, defendant was liable for all its consequences, mediate and immediate, and (ii) "The intermediate acts of Willis and Ryal will not purge the original tort in the defendant." Gould, J., was of the same opinion for the same reasons and also because "The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. . . . What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them." De Grey, C. J., was of the same opinion although he was also of the opinion that "The real question certainly does not turn upon the lawfulness or unlawfulness of the original act," but "whether the injury is the direct and immediate act of the defendant," and he thought it was, because he looked "upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting." And he also thought "that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower." He did not regard "Willis and Ryal as free agents . . . , but acting under a compulsive necessity for their own safety, and self-preservation." Blackstone, J., dissented. He agreed with De Grey, C. J., that "lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other." But he was of the opinion that Shepherd was not answerable in trespass "for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who were both free agents, and acted upon their own judgment." He was also of the opinion that "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion."⁵

(2) *Halligan v. The Chicago and Rock Island Railroad Co.*, 15 Ill. 558 (1854): Trespass *quare clausum fregit*. Plaintiff alleged: Defendant forcibly broke and entered two closes, the property of plaintiff, and expelled therefrom plaintiff and his family and Pendergast and Frinkler, plaintiff's tenants, who were "using and occupying said premises for hire, and paying unto [plaintiff] therefor at the rate of one thousand dollars per annum," and kept them expelled from the premises. De-

⁵ Shipman, *Common Law Pleading*, 72 (3d ed. 1923), refers to this case as an "illustration of the barren debates as to the distinction between trespass and case."

murrer to the declaration sustained. *Affirmed.* (i) "To maintain trespass *quare clausum fregit*, the plaintiff must have the actual or constructive possession of the premises. The gist of the action is the injury to the possession. If the premises are occupied, the action must be brought by the party in possession; if unoccupied, by the party having the title and the right to the possession. The owner cannot maintain the action, where the land is in the occupancy of his tenant. The trespass is a disturbance of the tenant's possession, and he alone can bring the action. . . . If the trespass is prejudicial to the inheritance, the remedy of the owner is by an action on the case. He may, in that form of action, recover damages for any injury to the freehold. . . ." (ii) The language of the declaration implies a leasing of the whole of the lots, and an exclusive possession thereof by Pendergast and Frinkler as plaintiff's tenants. The count does not show such a possession in plaintiff, as authorizes him to maintain the action, since he and his family may have been on the premises temporarily as guests of the tenants or for some other purpose, consistent with the latter's exclusive right of possession.⁶

BRADLEY v. DAVIS

Supreme Court of Maine, 1836. 14 Maine 44.

THIS was an action of *trespass* for taking and carrying away a harness of the value of \$30, alleged to be the property of the plaintiff. The plaintiff introduced testimony to show, that the harness originally belonged to one *Jameson*, who sold it to the plaintiff; that the harness remained in the possession of *Jameson*, who was authorised by the plaintiff to sell it for him; that *Jameson* agreed with the defendant to sell him the harness on condition, that he should pay ten dollars in cash on the *Monday* following, and secure the payment of the residue; that the defendant then took the harness, promising to return it the following *Monday*, if he did not before that time pay the money and give the security; and that neither was done; that the agent of the plaintiff did not sell the harness, or give the defendant any permission to keep it, unless payment was made and security given. He also proved, that the defendant afterwards sold the harness to another person.

The defendant contended, that there was an absolute sale to him by *Jameson*, and attempted to prove, that a trustee process had been served on him as the trustee of *Jameson*. Among other instructions requested by the counsel for the defendant, was one, that upon the facts testified to by the plaintiff's witnesses, no demand having been proved upon the defendant, *trespass* would not lie. Upon this point, *Weston C. J.*, who tried the action, in-

⁶ *Cf.* *Southern Railway Co. v. State*, *supra* p. 112.

structed the jury, that *trover*¹ would have been the more appropriate remedy; but that if *Jameson* had made no sale, and had reserved to the plaintiff, whom he represented, the possession on the *Monday* following his interview with the defendant, the plaintiff was entitled to the immediate possession on *Monday*, and that the sale and transfer afterwards by the defendant, might be regarded as a *trespass*. The verdict was for the plaintiff, and was to be set aside, if the jury were erroneously instructed. . . .

WESTON, C. J. The general property in the harness being in the plaintiff, drew after it such a constructive possession in him, as would enable him to maintain trespass against a stranger. The bailee being answerable to the general owner, may also bring trespass; and the right to maintain it attaches in him, who first brings the action. But a party shall not be charged as a trespasser for goods, which he received by delivery from the owner. *Williams*, in his notes to *Saunders*, 2 *Saund.* 47, note 1, says, that where the taking is lawful or excusable, trespass cannot be supported; but the owner must bring *trover*. And such was the opinion of the Court in *Cooper v. Chitty*, 1 *Burrow*, 20, and in *Smith et al. v. Miller*, 1 *T. R.* 475. In *ex parte Chamberlain*, 1 *Schoales & Lefroy*, 320, Lord Chancellor *Redesdale* says, that trespass cannot be brought for goods that were lawfully delivered.

If a party comes to the possession of goods lawfully, for any subsequent unlawful conversion of them, the appropriate remedy is *trover*. And this action will lie, where trespass will, for the unlawful taking is a conversion. But *Sergeant Williams*, in the note before cited, says, that the converse of this proposition is not true.

It has been ingeniously argued by the counsel for the plaintiff, that any act is a trespass, in relation to the goods of another, for which there is no justification or excuse. But the remedy for every such act, is not trespass *vi et armis*. That would be confounding all distinction between trespass and *trover*. Every unlawful conversion, is without justification or

¹ Cf. Martin, *Civil Procedure at Common Law*, 85-86 (1905): "Trover lies to recover damages for the value of specific personal chattels wrongfully converted by defendant to his use. To maintain the action, it is necessary that the plaintiff should have at the time of the conversion a right of property in the chattel, either general or special, together with actual possession, or the right of immediate possession. The right of immediate possession, such as belongs to a carrier, factor, or consignee, irrespective of any other right of property, has been held sufficient to maintain the action. Indeed, bare possession, even though wrongful, is sufficient to maintain it as against every one but the rightful owner. The owner of any special title, which includes the right of immediate possession, can maintain it against the general owner who has parted with or never had the right of possession."

excuse. If a man hires a horse to use two days, and he continues to use him the third day, it could hardly be contended that trespass would lie; although such use would be unlawful; and the owner would be entitled to the immediate possession. Yet being the general owner, and as such having a constructive possession, he might undoubtedly maintain trespass against a stranger, who should presume to use the horse on the third day. The ground of distinction is, that the taking by the stranger, would be tortious from the first. If *A* permits his goods to remain with *B* for his own use, and *B* delivers them to *C* to carry to another place, trespass does not lie by *A* against *C*. 6 *Comyns, Trespass, D*. The reason is, that *B* had the goods by delivery from the owner.

In the *Six Carpenters'* case, 8 *Coke*, 146, it was resolved, that whoever abuses an authority or license derived from the law, becomes thereby a trespasser *ab initio*; but that it is otherwise, where the license or authority is derived from a party. And *Baron Comyns* deduces from that case the general principle, that if a man has license or authority from the plaintiff himself, trespass does not lie against him, though he abuses his license by misfeasance. 6 *Comyns, Trespass D*.

The opinion of the Court is, that upon the facts in the case, an action of trespass cannot be supported.

Verdict set aside.

STINSON v. EDGEMOOR IRONWORKS

District Court of the United States, District of Delaware, 1944. 53 F. Supp. 864.

LEAHY, DISTRICT JUDGE. This matter concerns defendant's motion to dismiss the complaint. Two separate causes of action are alleged, based on two separate contracts of employment. The first is based upon a claim for percentages of profits alleged to be due plaintiff, covering the period from January 1, 1942, to February 21, 1943. To this cause of action defendant filed its answer and served an offer of judgment upon plaintiff. We are not here concerned with this portion of the complaint. For a second cause of action, plaintiff alleged he was employed by defendant for one year from February 22, 1943, under a contractual arrangement reached on March 12, 1943, but retroactive to February 22, 1943, at an annual salary of \$8,200. Breach is alleged by plaintiff's wrongful discharge on March 17, 1943, and by reason thereof he became entitled to damages in an amount representing the balance of his unpaid salary. Defendant's motion to dismiss is on the ground that plaintiff failed to state a cause of action.

* Defendant argues that the applicable law supports its motion; and as this court is bound by *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, to apply the law of Delaware in matters of substance, the case of *Ogden-Howard Co. v. Brand*, 7 Boyce, Del., 482, 108 A. 277, 8 A. L. R. 334, is applicable and controls. Due to the importance of that case for the decision here, it must preliminarily have our exclusive attention. In *Ogden-Howard Co. v. Brand* the plaintiff sued in debt for breach of an employment contract, alleging that the unpaid balance of his stipulated salary was his damages. The Supreme Court of Delaware reversed a judgment for the plaintiff and held that an action of debt would not lie because the action was not one for a sum certain. The parties differ in their interpretation of this decision. The plaintiff contends that all the court decided was that debt was not the proper form of action. Defendant, on the other hand, contends that it is implicit in the case that the burden of pleading and proving damages and mitigation in cases of breach of employment contracts rests squarely upon a plaintiff. From this, defendant argues it is not the burden of defendant to plead in mitigation of damages that plaintiff has or could have procured other employment reasonably adapted to his abilities. If this is not so under the Delaware law defendant says the action of the court in the *Ogden-Howard* case would have been entirely different in that the court would have sustained the action in debt and held that plaintiff had a *prima facie* right to recover the contract price, with the burden on defendant to prove the amount received or which might have been received by the plaintiff from other employment after his discharge.

First, defendant's argument must be tested by this proposition: If, however, the action of debt would likewise not lie in Delaware, even though mitigation was specifically pleaded by an allegation that plaintiff was entitled to the balance of the contract price because after the use of due diligence he was unable to secure other employment, then the *Ogden-Howard* case does not impel the conclusion that the Delaware law, as a matter of substance, imposes on the plaintiff here the burden of pleading and proving mitigation. My conclusion is that an action of debt would not lie in such a case in the Delaware courts. A quick reference to the historical development of the action of debt will, I think, support my conclusion.

In early times, the writ of debt seems to have been a writ of right for money and the action to have been a real action. The conception of the courts of that time was that the debtor was holding back something which he had granted, and which there-

fore actually belonged to the creditor, not that the debtor was merely under an obligation to pay money. Indeed, the action lay for chattels as well as for money. Our present conception of that jural relationship which we have labelled "a contract" was not its essence and debt never lay to recover damages for the breach of promises or covenants. The action of debt came to be the proper action for the recovery of a debt *ex nomine* and in numero, and though damages were generally awarded for the detention of the debt, they were in most instances merely nominal. 1 Chitty, Pleading (16th Am. Ed.) 121. That debt lies only where the sum is certain or can be readily reduced to a certainty by mathematical computation became firmly established. The early cases lay much stress upon the requirement that the claim sued upon must be for a definite amount. In fact, a plaintiff in an action of debt failed if the amount proved differed in any respect from the claimed amount.¹ But, it was not long before the courts were allowing plaintiffs to recover a smaller sum than

¹ In Ames, Lectures on Legal History, p. 88 et seq., the author states:

"The ancient conception of a creditor's claim in debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *praecipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in *detinue* for the recovery of a horse and could prove only the detention of a cow (*Smith v. Vow*, Moore 298; *Bagnall v. Sacheverell*, Cro. El. 292; *Hulme v. Sanders*, 2 Lev. 4 But afterwards the plaintiff was not held to a proof of the amount stated in the writ even in debt. *Aylett v. Lowe*, 2 W. Bl. 1221; *Lord v. Houston*, 11 East 62 See also 1 Chitty, Pl. 7th ed. 127-128). For the same reasons, debt would not lie for money payable by installments, until the time of payment of the last installment had elapsed, the whole amount to be paid being regarded as an entire sum, or single thing (*Rudder v. Price*, 1 H. Bl. 547; *Hunt's Case*, Owen 42). The obligation might arise either upon a record, a writing, that is a specialty either mercantile or not; it might arise from a statutory or customary duty; or it might arise from a simple contract with the transfer of a *quid pro quo*

"The obligation must be for a definite amount. A promise to pay as much as certain goods or services were worth would never support a count in debt (*Johnson v. Morgan*, Cro. El. 758). In YB 12 Ed. IV. 9, 22, Brian, C.J., said, "If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of debt against me." (See to same effect YB 3 Henry VI. 36, 33; *Anon.*, 2 Show. 183; *Mason v. Welland*, Skin. 238, 242). And debt could not be brought for board and lodging furnished, where no price was fixed; the persons who furnished the board and lodging would be without legal remedy. (*Young v. Ashburnham*, 3 Leon 161). For the same reason the quantum meruit and quantum valebant counts seem never to have gained a footing among the common counts in debt (1 Chitty, Pl., 7 ed., 351, 721, gives a precedent of such a count, but says that it has been doubted whether it lies. There is no case to it), and in *assumpsit* the quantum meruit and quantum valebant counts were disguised from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *indebitatus assumpsit* when no price had been fixed by the parties, the verdict of the jury being treated as equivalent to a determination of the parties at the time of the bargain.

"It was at one time doubted whether you could recover in debt on a specialty where the precise amount payable was not mentioned in the specialty, though it referred to something by which the amount could be made certain by outside evidence, (*Johnson v. Morgan*, Cro. Eliz. 758). Afterwards it was held that the plaintiff could recover if the amount could be made definite by extrinsic evidence before the action was brought. (*Anon.*, Style 31, *Sanders v. Marke*, 3 Lev. 429, *Bloome v. Wilson*, T. Jones 184)." [Footnote by the Court.]

that stated in the writ if the obligation proved was for a specific amount. For example, in *Rudder v. Price*, 1 H. Bl. 547, 550, Lord Loughborough suggests that, while the demand in an action of debt must have been for a sum certain, yet it was by no means so necessary that the amount be set out so precisely that less could not be recovered. See, too, *Ingledew v. Cripps*, 2 Ld. Raymond 814.

It became the settled law in England ever since the early *Young and Ashburnham's Case*, C. P. 1587, 3 Leon. 161, that a promise to pay so much as certain services or goods were worth, would not support a count in debt, as the price must be fixed. In that case, the defendant took lodging at the inn of the plaintiff, but there was no price "in certain" agreed upon between the parties. It was held that an action of debt would not lie. Moreover, debt never lay to recover damages for the breach of promises or covenants. See Maitland, *Forms of Action at Common Law*, p. 63.

The Delaware system of pleading and practice is presently that which prevailed in England at the time of the separation of the colonies. Whatever may have been the changes in the action of debt in other states, that action in Delaware remains today as it was at common law in England even prior to the adoption of the Hilary Rules in 1834. It is very clear that the action of debt as developed in England prior to the Hilary Rules of 1834 could not be used to recover damages for breach of an employment contract. In such suits the amount of damages—in accordance with the test set forth in the Delaware case of *Ogden-Howard*—is necessarily uncertain and unliquidated. The amount of such damages can only be ascertained by judgment of the court or by verdict of a jury after the consideration of many factors. The Delaware authorities reassert the principle that an action of debt will not lie, unless the demand is for a sum certain, or for a pecuniary demand which can readily be reduced to certainty by computation. No Delaware case has been found which even hints that its courts are disposed to deviate from the limitations of the action of debt as they existed in England at the time of the Revolution. Delaware inherited from England the law relative to an action of debt, and that law remains in force until it is changed by the Delaware courts or its Legislature. In fact, there have been no changes in the Delaware law relative to actions of debt, except in one instance. In 1933 the Legislature of the State of Delaware, *Laws of Del.*, Vol. 38, Chap. 201, abolished the distinction between an action of covenant and one of debt. But only to this limited extent has the original action of debt been changed from its formal status at

common law, and this was apparently found necessary by the enactment of a specific statute for this particular purpose. . . .

Viewed against the historical development of the action of debt, it is apparent that debt would not lie in Delaware to recover damages or compensation for breach of an employment contract *regardless of the allegations in the declaration*. I consequently think it clear that *Ogden-Howard Co. v. Brand*, *supra*, merely held that an action of debt was not the proper form of action, and consequently there is no basis for defendant's contention that there are additional holdings implicit in that decision. The precise problem before me is, therefore, the simple one of whether the complaint filed in the instant case is sufficient to satisfy the requirements of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. I think it sufficient—especially, since the rules are to be construed to “secure the just, speedy, and inexpensive determination of every action”. Here, the plaintiff, after stating the existence of a contract of employment and a discharge without cause by the defendant-employer, alleges: “8. By reason of Defendant's said breach of its contract with Plaintiff, Plaintiff is entitled to damages from Defendant in an amount representing the balance of Plaintiff's unpaid salary under his said contract with Defendant, the amount of which is the sum of \$6,491.65” I think this is a perfectly adequate and clear allegation and one that satisfies the requirements of Rule 8.

Even conceding *arguendo* that the manner of pleading mitigation of damages is a matter of substance, defendant's position would be no better. Since I conclude that *Ogden-Howard v. Brand*, *supra*, merely holds that debt was not the proper form of action for breach of an employment contract, there is no Delaware authority holding that there is a burden upon the discharged employee to plead and prove inability to mitigate damages. Indeed, it is possible to glean intimations from the *Ogden-Howard* case—especially in view of the cases cited and relied on by the court—that there is no such burden upon the discharged employee where the action is brought properly. I prefer, however, to treat the problem upon the assumption that there is no controlling Delaware decisional law upon this point. I conclude that Delaware would, under such circumstances, examine the general authority on this point and accept that authority as the law of Delaware. *Stentor Electric Mfg. Co. v. Klaxon Co.*, 3 Cir., 125 F. 2d 820; *Moyer v. Van-Dye-Way Corporation*, 3 Cir., 126 F. 2d 339. The general authority—and, in fact, the almost universal weight of authority—is that the burden of pleading and proving mitigation of damages is upon the defendant employer.

3 Williston on Contracts, Sec. 1360. The motion to dismiss is accordingly without merit.

There is an additional reason why I think defendant's motion to dismiss is without merit. Even if plaintiff were under a duty to plead inability to mitigate damages, I think the allegation of the complaint is sufficient for that purpose. I think it is implicit in the present allegation that plaintiff was unable to mitigate his damages and was accordingly entitled to all of the unpaid salary. This is sufficient as a point of pleading under the simplified pleading provided for by the new Rules of Civil Procedure. This imposes no hardship upon defendant for it can obtain any information relative to that matter before trial, if it so desires, by utilizing any one of several discovery procedures provided for in the Rules.

The motion to dismiss is accordingly without merit and is denied.²

McKAY v. DARLING

Supreme Court of Vermont, 1893. 65 Vt. 639.

START, J. The action is assumpsit and the plaintiff seeks to recover for services in sawing lumber, drawing slabs, and for damages sustained by him by reason of the defendant's failure to furnish slabs pursuant to his agreement. These items are all provided for in a written contract under seal and from the facts reported by the referee, we cannot say as a matter of law that the sealed instrument has been changed or modified.

By the sealed instrument the plaintiff was required to saw the lumber in question, the price to be paid therefor by the defendant and time of payment being provided for therein.

Each party was to pay one-half of the expense of drawing away the slabs and the defendant was to furnish the plaintiff with slabs for use in his engine. The referee has found that the sawing was done under this contract; that the defendant, under the contract, should pay one-half of the expense of getting the slabs away from the mill; and that the defendant failed to furnish the slabs stipulated in the contract. From these findings, it is clear that the parties have acted under the sealed contract, and that there has been no modification of it. There having been no subsequent parol modification of the contract, and the plaintiff having performed the service under the contract in reliance upon it, and the omission of the defendant being an omission to perform and keep the covenants contained in the sealed instru-

² Cf. *Williamson v. Columbia Gas & Electric Corporation*, 110 F.2d 15 (C.C.A. 3d 1939).

ment, the action of assumpsit cannot be sustained. The plaintiff has a remedy by an action of covenant upon the sealed contract, and having this remedy, he cannot waive it and bring assumpsit. *Myrick v. Slason*, 19 Vt. 121; *Camp v. Barker*, 21 Vt. 469; *King, Fuller & Co. v. Lamoill Valley R. R. Co.*, 51 Vt. 369; *Wood et al. v. Edwards et al.*, 19 Johns. 205; *Codman v. Jenkins*, 14 Mass. 93. In *Myrick v. Slason*, *supra*, it is held that when a party has a remedy by an action of covenant on a contract under seal, he is precluded from suing in assumpsit.¹ . . .

MAINE, EARLY LAW AND CUSTOM

1883. 389*

The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law. . . . Nobody should know better than an Englishman that this is not an arrangement which easily and spontaneously suggests itself to the mind. So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.

B. The Necessity of Conformity of Declaration to Writ

SLATER v. FEHLBERG

Supreme Court of Rhode Island, 1903. 24 R.I. 574, 54 A. 383.

TILLINGHAST, J. There is a fatal variance between the writ and declaration in this case, and hence we are of opinion that the action must be dismissed.

The form of action set out in the writ is trespass on the case; while that set out in the declaration is trespass.

Our statute relating to amendments is not sufficiently broad to enable the court to permit the form of action to be changed.

. . .

As a variance like the one in question may be taken advantage of at any stage of the case, the mere fact that the general

¹ In the part of the opinion omitted the court rejected plaintiff's contention that he should be permitted to amend his declaration, saying: "An amendment that changes the form of action from assumpsit to covenant is not allowable."

* By permission of Henry Holt & Company, Inc., publisher.

issue and other pleas were filed by the defendants before taking the objection is immaterial. . . .

The case is remanded to the Common Pleas Division, with direction to dismiss it.

NOTE

P. B. & W. R. R. Co. v. Gatta, 27 Del. 38, 44-45, 85 A. 721 (1913): "The principal object of the original writ was to confer jurisdiction upon a court of law to hear the matter in controversy, for at common law no action could be maintained in any superior court without the sanction of the king's original writ. Its other object was to compel the appearance of the defendant. As this writ issued out of one court for the purpose of conferring jurisdiction upon another, obviously the writ could not be amended in the latter court. As the jurisdiction conferred by the writ upon the law court was limited to the trial of the specific cause of action stated in it, any subsequent statement of a cause of action different from the one stated in the writ was in excess of the jurisdiction conferred by the writ, and constituted a departure, and of course would not be allowed by amendment. Amendments of pleadings subsequent to the declaration at common law were liberally allowed both in point of character and time (2 Burr. 756), but an amendment to a declaration was restricted to one that did not depart from the action stated in the writ and then only when asked for before the end of the second term, for after that term the amendment was considered 'a new declaration' and would not be allowed, 1 Wilf. 149, 223; Say. R. 234."

F. W. WOOLWORTH CO. v. SUNLIGHT CHEMICAL CORPORATION

Supreme Court of Rhode Island, 1939. 63 R.I. 384, 9 A.2d 8.

CAPOTOSTO, J. This case is before us on plaintiff's exception to a ruling of the superior court sustaining defendant's demurrer to the declaration. The action is designated in the writ and declaration as an action on the case.

The declaration is in one count. In substance, the allegations are as follows. The plaintiff is a retail dealer in merchandise, with a store in Saratoga Springs, New York. The defendant, a Rhode Island corporation, is a manufacturer, bottler and distributor of "household ammonia, which is a dangerous liquid and a poison if taken internally", with a place of business in East Providence, in this state. On September 23, 1936, the defendant sold and delivered to the plaintiff certain bottles of said ammonia "negligently packed by the defendant, its agents and servants in this, that it was packaged in whisky bottles with a surface so corrugated that labels might become detached."

The plaintiff further alleges that, in the ordinary course of business and in the exercise of due care, it sold one of these

bottles of ammonia on February 8, 1937, to one Anna Mae McEniry, in its store at Saratoga Springs; and that thereafter, on February 20, 1937, one Anna M. McEniry, the mother of Anna Mae McEniry, brought suit against it in the state of New York; and that on February 14, 1937, Anna M. McEniry, the mother, "drank a quantity of said household ammonia from said bottle sold by this plaintiff to her said daughter, believing it to be whisky and that she received personal injuries, and that she was caused to drink the same out of said bottle because of the appearance of said bottle as a whisky bottle and because of the absence of a label making known the contents of the bottle and that the same was a poison, and claiming damages of Twenty-Five Thousand (25,000) Dollars."

The plaintiff here further alleges that the label on the bottle of ammonia became detached by "reason of the alleged negligence of the defendant in packaging the ammonia in whisky bottles" and that said Anna M. McEniry was induced to believe and did believe that said bottle contained whisky; that upon the commencement of the suit by Anna M. McEniry against this plaintiff, the latter duly and seasonably notified this defendant to take upon itself the defense of that action, which it neglected and refused to do; and that, in defending that suit, this plaintiff was obliged to pay to Anna M. McEniry the sum of \$1500 in settlement of said suit, which was a reasonable sum in the circumstances. "Wherefore, by reason of the premises, the defendant became liable to reimburse the plaintiff for the payment of said sum."

The defendant demurred to this declaration. The substantial grounds of demurrer may be summarized and grouped as follows: (1) That the declaration is vague, uncertain and indefinite in that it fails to show with reasonable certainty whether the plaintiff rests its cause of action in contract or in tort; (2) that the declaration fails to state a cause of action either in contract or in tort; (3) that the declaration fails to show that Anna M. McEniry ever had a cause of action against the plaintiff or the defendant; and (4) that, from the allegations in the declaration, the injury to Mrs. McEniry appears to have resulted from her own contributory negligence or from the negligence of her daughter.

Under our practice, the plaintiff in an action at law must allege sufficient facts in his declaration to support his cause of action; and he can recover only on the case thus set forth if, on trial, the necessary allegations of the declaration are established by competent proof. A defendant is entitled to know the case which he is called upon to meet, so that he may prepare his defense and meet the facts alleged with appropriate evidence.

We appreciate that situations may arise where the facts and circumstances are so involved that the pleader is in doubt whether the cause of action is in contract for breach of an implied warranty, or whether it is in tort for negligence. But, however difficult the determination of such a question may be, the duty rests with the plaintiff to make his choice of the cause of action upon which he intends to rely for recovery. The defendant is not required to construe the plaintiff's cause of action at his peril, nor should he be put at a distinct disadvantage in preparing and presenting his defense because of the plaintiff's vagueness and uncertainty in the statement of his case.

In the instant case, we agree with the defendant that from the allegations in the declaration it is not clear whether the plaintiff's alleged cause of action is in contract or in tort. The facts, as alleged in this declaration, fail to inform the defendant with reasonable certainty whether the plaintiff means to rely upon an alleged breach of warranty or on negligence. The defendant's demurrer was properly sustained on this ground.

If we were to assume, from certain technical language and allegations in the only count of the declaration, that the plaintiff in drafting it had in mind the case of *Pawtucket v. Bray*, 20 R. I. 17, 37 A. 1, and that the present action for reimbursement was based upon the defendant's negligence, the declaration is demurrable in that it fails to state sufficient facts showing that the defendant is ultimately liable to this plaintiff.

An inspection of the declaration discloses at least the following deficiencies. We find no allegations that identify, either by name or description, the cause of action upon which Mrs. McEniry relied in her action against the plaintiff and which the latter chose to settle without trial. Furthermore, if Mrs. McEniry's suit was for negligence, there is no allegation, unless found by construction as a remote inference, that at the time of injury Mrs. McEniry was in the exercise of due care.

For the reasons stated, we are of the opinion that there was no error in the ruling of the superior court sustaining the defendant's demurrer to the plaintiff's declaration.

The plaintiff's exception is overruled, and the case is remitted to the superior court for further proceedings.

FIRST REPORT OF HER MAJESTY'S COMMISSIONERS ON
THE SUPERIOR COURTS OF COMMON LAW

1851. 31-32.

Now, it is a rule that no two of these forms can be joined in one action, except that debt may be joined with detinue, and case with trover, which is one of the varieties of that form of action. Thus, if a man has a claim against his tenant for breach of a covenant to repair contained in a lease under seal, and a further claim against the same tenant for nonrepair of another house let by lease or agreement not under seal, he must bring two actions, one of covenant and the other of assumpsit, to enforce those claims. If he has a further claim for a trespass to a third house which the same person has occupied under the pretence of its being let to him, a third action must be brought; and a fourth action would have to be brought if the defendant had done a permanent injury to premises let by the plaintiff to a third person.

We need not multiply instances. It is unreasonable that a plaintiff should be compelled to bring two actions when the different causes of complaint may, without inconvenience, be combined in one proceeding, as when he has one claim on a bond and another on a bill of exchange, or seeks redress for slander and assault against the same person.

The former Commissioners suggested a partial remedy, namely, that a misjoinder of forms of action should be ground of special demurrer only, and that a mistake in the form of action itself, when brought in trespass or case, should be amendable at the trial. We think that this proposition does not go far enough; and after mature deliberation we are satisfied that no reform in pleading will be complete unless the present state of the law as to forms of action be altered.

One of the arguments in favour of the present system is, that the rule as to not joining different forms of action prevents incongruous and dissimilar causes of action from being inconveniently mixed together in the same suit.¹ But this is without foundation. Causes the most dissimilar may, as the law now stands, be joined. The plaintiff may join in one action a claim on a promissory note, on a breach of promise of marriage, and a complaint of negligence against an attorney; in a second he may join a claim for criminal conversation with trespass to his person, his land, or his goods; in a third he may sue for the

¹ The "former Commissioners" also said [Third Report, 13 (1831)] that "to permit a plaintiff to join at his discretion, all the different forms of action, would tend to make the distinctions of form less accurately observed."

seduction of his daughter, infringing his patent, and for negligently driving over and slandering him; because in all these cases the form of action is the same. The joining of incongruous causes of action therefore may now occur. We believe it is impossible to lay down general rules by which it could be prevented, without great mischief; and that plaintiffs may be safely trusted in this matter. A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may divert attention to a question of whether he is entitled to the price of goods sold, or other incongruous matters.

We propose to abolish the existing rule, and to allow a plaintiff to join in one and the same action all his causes of complaint. But to prevent any inconvenience which in any particular case might ensue from a joint trial of several causes of action, we propose that the Court or a Judge shall have power to prevent the trial of different causes of action together, if such trial would, in their judgment, be inexpedient, and in such cases may direct separate trials.

Chapter VIII

UNIFICATION AND UNIFORMITY

SECTION 1. A CRITIQUE OF THE FORMULARY SYSTEM

FIRST REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS

1848. 67-69, 73-76.

The chief object of this title¹ is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any essential reforms can be effected in remedial law. We refer to the abolition of the distinction between actions at law and suits in equity, and of the forms of such actions and suits. This principle it is proposed to declare by section 62, which provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be, in this state hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."²

In our remarks upon this section we shall consider separately, the two propositions which it involves.

The first is, the abolition of the distinction between actions at law and suits in equity. The separate jurisdictions of law and equity, exercised by distinct tribunals, as they existed in this state up to the adoption of the new constitution, were borrowed from similar institutions in England, with such modifications, as the genius of our people rendered necessary. In the early history of the English law, there was but one system of jurisprudence and one form of tribunal by which it was administered. We refer to the courts of common law. In the progress of time, the unbending rigor of common law rules was found to be a grievance, which rendered necessary the exercise of some judicial power, by which the severity of the common law might be relaxed. The establishment of the court of chancery, the original design of which was to soften the rigor of the common law, and to do complete and perfect justice, by means of the peculiar

¹ Title I, entitled "Of the Form of Civil Actions," of Part II, entitled "Of Civil Actions," of the Code of Procedure proposed by the Commissioners.

² This proposed section became § 62 of the Code of Procedure (1848).

forms of proceeding with which it was invested, where injustice would otherwise have followed, was the result. In the exercise of its functions, new principles were adopted, new modes of proceeding devised, and powers, some of them exclusive of and others concurrent with the courts of law, became the means, by which its jurisdiction was administered.³

With these attributes, that court was incorporated into the judicial establishment of this state; and until it was abolished by the new constitution,⁴ it continued to exist, and to exercise substantially the same powers as are exercised by the court of chancery in England. Its forms and modes of proceeding, not merely in enforcing the substantial rights of parties, but in the ordinary proceedings by which suits were conducted, were essentially different from those of the common law courts; and not merely in the formal conduct of litigation, but in the substantial rules by which rights were to be determined, it had built up as distinct a system as it is possible to conceive. The result was, in this state, as it has ever been in England, since the separate establishment of this court, a conflict of jurisdiction, and a difference of judicial opinion, as to the precise boundary which separated the powers of law and equity; leading to a call on the part of the people, for such a course of measures, as would ensure the attainment of substantial justice, and remove the embarrassments in the organization of the judiciary establishment, by which there was good reason to fear, it had too often been defeated.⁵

³ Cf. First Report of Her Majesty's Judicature Commission, 5-6 (1869): "This distinction [between Common Law and Equity] led to the establishment of two systems of Judicature, organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. Large classes of rights, altogether ignored by the Courts of Common Law, were protected and enforced by the Court of Chancery, and recourse was had to the same Court for the purpose of obtaining a more adequate protection against the violation of Common Law rights than the Courts of Common Law were competent to afford. The Common Law Courts were confined by their system of procedure in most actions,—not brought for recovering the possession of land,—to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of important cases frequently occur in the practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial; and ultimately those cases either find their way into the Court of Chancery, or the Suitors in the Courts of Common Law are obliged to have recourse to private arbitration in order to supply the defects of their inadequate procedure. The evils of this double system of Judicature, and the confusion and conflict of jurisdiction to which it has led, have been long known and acknowledged."

⁴ Article VI, § 3, of the constitution of 1846 provided: "There shall be a supreme court having general jurisdiction in law and equity."

⁵ At this point there is omitted a quotation from the debates of the constitutional convention of 1846.

The history of jurisprudence, both in this state and in England, . . . affords a most convincing proof of the wisdom of the measure adopted by the people of this state, in abolishing the distinction between law and equity tribunals. Notwithstanding their separate existence, they had, under the institutions of this state, but one common object, the administration of justice—depending not upon the mere discretion of the court, but ascertained by fixed and certain rules of law. And yet, while they were kept distinct, though their jurisdictions continually encroached upon each other, there were certain rules, not well defined, but yet existing, by which their powers were distinguished. It is, therefore, no matter of surprise, that the books are filled with cases, in which the injustice has been imposed upon parties, of suffering the loss of a substantial right, because of a mistake in the choice of a forum, before which its enforcement was sought. If it were necessary, scores of cases might be cited, in which, after a long and protracted controversy upon the merits, the cause ultimately turned upon the question of mistaken jurisdiction. . . .

Without intending to anticipate the discussion of its provisions in their appropriate places, we may here briefly advert to some points, in which the assimilation of law and equity procedure has been supposed by some, to be attended with insurmountable difficulties.

The first of these is the subject of *pleading*. The distinguishing feature now existing between pleadings at law and in equity is, that in the former, the professed object is, by concise and formal statements of conclusions of fact, to bring the cause to a distinct issue, either of fact or of law,—while in the latter, the facts of the case may be stated without technicality, and with a minuteness of circumstantial detail, tending to establish the proposed conclusion of fact, in a manner forbidden by the rules of pleading, which prevail in the courts of law.⁶ This distinction, so far as equitable pleading is concerned, has resulted mainly from the peculiar power of a court of equity in

⁶ Cf. First Report of Her Majesty's Judicature Commission, 11 (1869): "The systems of pleading now in use, both at Common Law and in Equity, appear to us to be open to serious objections. Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded. . . ."

enforcing discovery in aid of the relief sought, and in the necessity which existed for minute detail, in order more effectually to probe the conscience of the defendant. At law, with some unimportant statutory exceptions, no such power exists; and hence, nothing but *conclusions* of fact have either been permitted or required in pleading. We propose to reduce the system of pleading to one of *allegation* merely, without reference to discovery, in the mode which will presently be suggested; so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable. And in order to prevent any prejudice which might otherwise result from the necessity now existing in equity, for the kind of pleading to which we have referred, we present a series of enactments, providing that in all cases, either party may obtain from the other a discovery under oath, of all facts necessary to the prosecution or defence of the action.⁷

NOTE

Keigwin, *Cases in Code Pleading*, 43-44 (1926): "This provision of the Code—as must be attentively observed—does not abolish the distinction between law and equity, but only the distinction between actions at law and suits in equity. The enactment does not affect any alteration in the substantive law; it is merely a new mode of procedure that is ordained. . . . The inherent diversity between these two bodies of doctrines is not abrogated—as indeed it could not be; and legal doctrines and equitable doctrines, with their distinctive differences, remain quite as they were before. . . . The distinction abolished is in the manner of asserting the different kinds of rights—between the declaration at law and the bill in equity: the rights themselves remain as distinct as ever in all their essentials, such as origin, extent, constituent elements, requisite proof, and character of remedy.

"That the substantial difference between law and equity is necessarily permanent results from (at least) two considerations:

"1. The right of trial by jury in actions at law is secured by the constitutions of all the States, while controversies of equitable nature are left subject to adjudication, in matters of fact as well as of law, by the court. The codes, therefore, in reducing both classes of suits to a single jurisdiction and a common form of pleading, are obliged to preserve the distinction, so far as to differentiate the mode of trial.

"2. There is an inherent difference between causes at law and causes in equity which, as it exists in the nature of things, cannot be obliterated even in theory and cannot be ignored in

⁷ The Judicature Commission proposed that all of the Superior Courts of Law and Equity and the Courts of Probate, Divorce, and Admiralty be consolidated into one court, to be called "Her Majesty's Supreme Court," to be vested with all the jurisdiction of each and all of the courts so consolidated. This proposal was adopted by the Judicature Act 1873.

practice. The right to recover damages for the breach of a contract to convey land is a thing essentially different from the right to enforce specific performance of the same contract; both rights may exist in the same transaction, but their coexistence does not make them identical; one may arise without the other, and if both are present, they are of diverse obligation, rest upon distinct theories, require variant proof, are subject to different principles, and call for modes of relief which differ *toto coelo*. So of the right to recover damages for a nuisance and the right to enjoin the maintenance of the same nuisance. In such cases it is possible to provide that both rights may be asserted in the same court, presented in pleadings of the same literary form, and tried by the same judge; and this the Code has done; but it is not possible to provide that the judge shall apply the same principles of law to both demands; and this the Code has not attempted to do."

MOEN v. THOMPSON

Supreme Court of New York, 1946. 186 Misc. 647, 61 N.Y.S.2d 257.

SHIENTAG, J. The motion is to dismiss the complaint. According to its allegations, plaintiff obtained a divorce from defendant in the State of California on the ground of cruelty. The decree directed that defendant pay plaintiff alimony in the sum of \$100 a month for her support and the support of their three minor children who are in her custody. The parties are now residents of the State of New York. During the months of September, October and November, 1945, defendant paid no alimony. Defendant's annual income, it is alleged, exceeds \$10,000. Plaintiff claims she will be unable to feed, clothe and educate the three children unless defendant is required to pay at least \$250 a month in alimony instead of the present \$100. Plaintiff alleges that she has no adequate remedy at law.

In her prayer for relief plaintiff asks that the amount of accrued and unpaid alimony be adjudged and determined; that defendant be adjudged to pay plaintiff that amount; that he be ordered to pay plaintiff future alimony at the rate of \$250 per month; that defendant be required to give security for the payment of future alimony; that his personal property be sequestered and a receiver appointed; that he be enjoined from disposing of any of his property until he pays the arrears and gives security for future payments, and for such other and further relief as may be just.

Contending that the defects are apparent on the face of the complaint, defendant moves to dismiss on the grounds of legal insufficiency, lack of capacity in the plaintiff, and lack of jurisdiction in the court. Plaintiff replies that section 1172¹ of the

¹ This section provides: "Where the husband, in an action . . . for the enforcement in this state of a judgment for divorce . . . rendered in another

Civil Practice Act authorizes her suit. She argues generally that changed circumstances give the court power to award alimony in excess of that awarded by the California decree. She also suggests that, in any event, the complaint states a cause of action at law for the \$300 in unpaid alimony, and this regardless of her attempted resort to remedies distinctly equitable in character.

While plaintiff's brief states that she sues pursuant to section 1172, some of the relief which she asks is of the type provided in section 1171.² Neither section, however, is available to her. Section 1171, where a divorce is involved, is expressly limited to the situation in which a divorce has been decreed in this State, or has been decreed in another State upon the ground of adultery. Section 1172 does not in terms specify the ground upon which a foreign divorce must have been obtained in order to make the provisions of the section applicable. It has been held, however, that the two sections must be read together, and that the limitation of foreign decrees to those based upon adultery qualifies the application of section 1172 as well as section 1171 (*Müller v. Müller*, 210 App. Div. 61, 210 N. Y. S. 203, affirmed 246 N. Y. 636, 159 N. E. 681). Since the ground of the California divorce in the present case was cruelty, neither section can be invoked.

This reduces plaintiff's contentions (except that concerning her right to a money judgment) to the proposition that a court of equity has jurisdiction, apart from statute, to modify an award of alimony under a foreign decree when changed circumstances indicate such a course to be necessary. It is clear that the court has no power to increase the provision for the spouse (*Little v. Little*, 146 Misc. 231, 262 N. Y. S. 654, affirmed 236 App. Div. 826, 259 N. Y. S. 973; cf. *Ramsden v. Ramsden*, 91 N. Y. 281). It would not be inconsistent with the traditions of equity to suggest that where children are concerned, the Supreme Court

state, makes default in paying any sum of money as required by the judgment . . . directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the sequestration of his property, or by resorting to the security, if any, given as prescribed by statute, the court, in its discretion, may make an order requiring the husband to show cause . . . why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him. . . ."

² This section provides: "Where . . . a judgment rendered in another state for divorce on the ground of adultery . . . upon which an action has been brought in this state and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court, in its discretion, also may direct him to give reasonable security . . . for the payment . . . of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment . . . , the court may cause his personal property and the rents and profits of his real property to be sequestered and may appoint a receiver thereof. . . ."

has inherent power to make additional provision for their support when a change of circumstances has made inadequate the original amount awarded under a foreign decree. A court of general equity jurisdiction has an especial interest in the protection of infants. (4 Pomeroy on Equity Jurisprudence (5th ed.), §§ 1303-1305.) Such a court, it is urged, should not be powerless to accomplish adjustments necessary to the proper upbringing and education of the children of a disrupted home.

The authorities, however, are the other way. Though not numerous, they are substantially in agreement. [Citations omitted.] The Domestic Relations Court undoubtedly has power to require payment in excess of the amount which a foreign decree of divorce has fixed for the support of the children (*Serima v. Scrima*, 265 App. Div. 483, 39 N. Y. S. 2d 369). But this power is given by express statutory provisions which have no application to the Supreme Court.

The portion of the complaint dealing with unpaid alimony remains to be considered. The foreign decree of divorce is pleaded and alimony in a stated sum is alleged to be due and unpaid. This, standing alone, would amount to a sufficient statement of a cause of action at law. The complaint, however, is framed entirely in equity; it seeks no money judgment but does ask for various forms of equitable relief to which the plaintiff is not entitled. The question is whether, notwithstanding the fact that a good cause of action in law may be spelled out from a portion of the pleading, the entire complaint must be dismissed.

The New York State Constitution of 1846 abolished the Court of Equity and vested its jurisdiction and powers in the Supreme Court. Section 8 of our Civil Practice Act, which is derived from section 69 of the Code of Procedure (Field Code of 1849), provides as follows: "There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

From an early date it was held that these reforms did not result in a fusion of legal and equitable substantive rules (*Chipman v. Montgomery*, 63 N. Y. 221). Nevertheless, they were designed to accomplish a fundamental procedural consolidation of the two systems. The authorities, for the most part, have sought to carry out this design, although judicial resistance to the implications flowing from such a procedural fusion has occasionally manifested itself (Clark on Simplified Pleading, 27 Iowa L. Rev. 272, 276;³ Walsh on Equity [1930], pp. 109-116).

³ "One may perhaps," Judge Clark says in this article at p. 276, n. 8, "be permitted to give examples from two particularly able appellate courts. Thus in New York, the Court of Appeals seems to have revived dismissal of an action 'in

It is a basic principle of code pleading that a complaint, which on its face states a good cause of action, is not subject to dismissal even though it contains a prayer for relief to which the plaintiff is not entitled. Where the only defect in a complaint is in the prayer for relief, the prayer may be disregarded because it is not an essential part of a cause of action. [Citations omitted.]

There is a line of cases holding that a complaint entirely equitable in character, and seeking unattainable equitable relief, may be dismissed on motion before answer although it might be possible to find, in the complaint, facts which would entitle the pleader to some form of relief at law. (*Spring v. Fidelity Mutual Life Insurance Co.*, 183 App. Div. 134, 170 N. Y. S. 253; *Gosselin Corp. v. Mario Tapparelli fu Pietro, Inc.*, 191 App. Div. 580, 181 N. Y. S. 883, affirmed 229 N. Y. 596, 129 N. E. 922.) There is, however, no authority for the proposition that in such a situation the complaint may be dismissed outright and the plaintiff required to institute a new action at law for the relief to which he is entitled. Almost uniformly the cases have held that the pleader who mistakes his remedy will not be put out of court but will be permitted to serve an amended complaint although the amendment would transform what was originally an action in equity to one at law. Such was the general rule even before the enactment of section 111⁴ of the Civil Practice

equity' for one at law [Turner v. Glickstein & Turner, 283 N.Y. 299, 28 N.E.2d 846 (1940)], contra to its own clear statement in *Wainwright v. Burr & McAuley*, 272 N.Y. 130, 5 N.E.2d 64 (1936); and has refused a shift in theory from contract to fraud [Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 11 N.E.2d 902 (1937), reversing 251 App. Div. 300, 296 N.Y.S. 342 (1st Dep't 1937) and requiring the institution of an entirely new action, *ibid.*, 283 N.Y. 99, 27 N.E.2d 518 (1940), reversing 257 App. Div. 254, 12 N.Y.S.2d 876 (1st Dep't 1939), 258 App. Div. 707, 14 N.Y.S.2d 1013 (1st Dep't 1939)], so that, after some six hearings in various courts and over several years, the parties are, if anything, farther from decision than they were when they began. See also the same point in *Cohen v. City Co. of New York*, 283 N. Y. 112, 27 N.E.2d 803 (1940), but otherwise under the Federal Rules. *Downey v. Palmer*, 114 F.2d 116 (C.C.A. 2d, 1940). So in Connecticut, the court in *Kinderavich v. Palmer*, 127 Conn. 85, 15 A.2d 83 (1940), has overruled the simple and clear pleading, in a negligence case involving the 'last clear chance,' of *Mezzi v. Taylor*, 90 Conn. 1, 120 A. 871 (1923); and in *Frosch v. Sears, Roebuck & Co.*, 124 Conn. 300, 199 A. 646 (1938), has found a fatal variance after verdict and on appeal between an allegation of injury to the plaintiff by a fall due to a tricycle left in the aisle of defendant's store and proof by a fall due to a tricycle placed under a counter, but protruding out into the aisle." See also Clark, Simplified Pleading in Connecticut (1942) 16 Conn. B. J. 83, 85.

⁴ This section provides: "Whenever in any action or special proceeding it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy upon the facts pleaded or alleged, or proved, is different from that asked for in the pleadings or corresponding papers, the proceedings may be amended upon such terms as may be just, if jurisdiction exists to grant the proper remedy, and may be continued and determined by the court and at the term where then pending, or remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for the relief granted. The court may correct by amendment all defects and irregularities in matters of form

Act which confers upon the court the broadest power of amendment at any stage of the proceedings. [Citations omitted.]

The case of *Turner v. Glickstein & Turner, Inc.* (283 N. Y. 299, 301, 28 N. E. 2d 846)⁵ is not authority to the contrary. In that case the court said: "We do not consider whether a good cause of action at law might be spelled out from the allegations of the complaint. The complaint here was framed in equity and equitable relief alone is demanded and if the action does not lie in equity for the reason urged by defendant, the complaint must be dismissed"

The complaint was dismissed outright; no leave to amend was granted. The failure so to do may be ascribed to the neglect of the plaintiff, in the briefs submitted by him, to ask to be allowed to amend. In any event, the right of the plaintiff to serve an amended complaint was not considered by the court and no reference was made to it. The language in the *Turner* case (*supra*) must be viewed in the light of earlier decisions of the Court of Appeals and of the history of procedural reform in this State. So considered, it clearly does not authorize the conclusion that before answer a plaintiff may not obtain the right to amend his complaint by changing an action for unattainable equitable relief to an appropriate action at law. (Cf. *Standard Film Service Co. v. Alexander Film Corp.*, 214 App. Div. 701, 209 N. Y. S. 924, where the complaint was dismissed, before answer, without prejudice to an action at law. The very cases cited by the court allowed an amendment and did not require a new action to be instituted.)

With that interpretation placed upon the *Turner* case (*supra*), it fits generally into the pattern of the decisions on this question, a pattern which is clearly defined although not altogether logical in its implications. The cases distinguish between a situation where the motion to dismiss is made before answer and where it is made after answer. After answer, and at any stage of the trial before it is concluded, the complaint will not be dismissed. [Citations omitted.] The cause will be transferred to the law side of the court there to be dealt with in

or procedure and may bring in all parties necessary to completely determine the matter and award the appropriate relief upon the facts established."

⁵ In the *Turner* case, plaintiff, a former employee of defendant, alleging that he had no adequate remedy at law, sued in equity, in behalf of himself and of others similarly situated, and sought judgment "directing the defendant to account for and pay to the plaintiff, and all others similarly situated, the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages; directing the defendant to pay a reasonable attorney's fee to the attorneys for the plaintiff herein, together with the costs and disbursements of this action' and for such other and further relief as may seem just and proper." The suit was based upon the Fair Labor Standards Act (52 U. S. Stat. 1060).

a manner appropriate to actions at law. [Citations omitted.] Presumably, however, at some stage of the proceedings the pleadings may have to be amended where such amendment would have been necessary if the action had originally been brought on the law side of the court. (Cf. *International Photo Recording Machines v. Microstat Corp.*, 269 App.Div. 485, 56 N.Y.S.2d 277.)

Logically, perhaps, there should be no distinction on the basis of the time when the motion to dismiss is made, whether before or after answer.⁶ The reasons for such a distinction are largely those of expediency and practicality. The interposition of an answer is of itself an indication that the adversary has had no difficulty in framing his response and, in a general way at least, in defining the issues. Perhaps the best explanation is that it is desirable, even under a liberal system of code pleading such as prevails in this State, that a complaint before answer be put into proper form.

The Appellate Division of this department expressed it thus: ". . . as a matter of common sense, and in the interest of good practice and for the convenience of the court and the parties a complaint should be so framed as to present the real issue which is intended to be litigated so that it may be noticed and brought on for trial in the proper part of the court. The plaintiff is not thrown out of court; he is simply asked to properly frame his complaint. If the defendant does not take timely steps to procure this result, but interposes an answer and waits until the trial to raise the question, an entirely different proposition is presented. Here the point is raised before answer. The rule hereinbefore laid down makes for good pleading and for good practice." (*Low v. Swartwout*, 171 App. Div. 725, 731-732, 157 N. Y. S. 1067, *supra*.)

It might be urged that it is more logical, even in a situation such as we are considering, to allow the complaint to stand, as to the cause of action at law found therein, and to strike out the remaining portions seeking unattainable equitable relief, as unnecessary and irrelevant under rule 103 of the Rules of Civil Practice⁷ (and perhaps require an amended complaint, omit-

⁶ Section 479 of the Civil Practice Act, formerly section 1207 of the Code of Civil Procedure, may suggest a reason, although it does not seem to be a cogent one. That section provides in substance that where there is no answer, the judgment shall not be more favorable to the plaintiff than he has demanded in his complaint. That section, it has been held, relates not to an action where a demurrer has been interposed but to one where a judgment is to be entered by default, and where the facts in the complaint show that the plaintiff is entitled to any relief, either legal or equitable, it is not dismissible on the ground that the party has not demanded the precise relief to which he appears to be entitled. (*Parker v. Pullman & Co.*, 36 App. Div. 208, 56 N.Y.S. 734, *supra*.) [Footnote by the Court.]

⁷ For this rule, see *infra* p. 414.

ting the objectionable matter, to be served as in that rule provided). Under rule 103, however, the court is powerless to frame a new pleading for the parties. It cannot insert in the pleading any essential allegation that has been omitted. All that it can do is to order objectionable or unnecessary or irrelevant matter stricken from a pleading, where, after the elimination, a good cause of action remains. Rule 103, therefore, could rarely be invoked in dealing with the problem under consideration although it might perhaps be resorted to in the instant case. Generally, the pleading requires more than excision; it has to be reformed or reconstructed. A dismissal without prejudice and with leave to amend meets the needs of the pleader who has mistaken his remedy. Moreover, it gives him the choice of determining whether he will amend, and if so, in what manner. The fact that the Statute of Limitations may run prior to the amendment presents no real difficulty, since the facts already pleaded would constitute the basis of the amended complaint.

The motion to dismiss the complaint is accordingly granted without prejudice and with leave to serve an amended complaint in accordance with the foregoing determination on or before April 15, 1946, upon payment of costs. Settle order.

NOTE

Shientag, *Moulders of Legal Thought*, 148-150 (1943) *: "It is true that by legislation many substantive rules have ceased to be rules of law or of equity and have become statutory rules. Many principles of equity have, by enlightened judicial decisions, been absorbed by the common law and that process is an ever continuing one. Generally speaking, however, legal rights and equitable rights remain as distinct as ever and the same facts must now be pleaded to obtain relief, whether legal or equitable, as before the adoption of the Old Code in this state and of the Practice and Judicature Acts in England. The jurisdictional and procedural changes accomplished by this legislation undoubtedly will and should have the effect of a gradual obliteration of the distinctions in substantive law between the two formerly independent systems. The problem is complicated, in this state, by the constitutional right to trial by jury, but that difficulty is not insurmountable.

"The trouble in New York, for the moment, is that it does not seem to have given full effect to the jurisdictional and procedural consolidation of the two systems. Thus, in *Terner v. Glickstein & Terner Inc.*,⁸ the Court of Appeals ruled in effect,

* By permission of the author and The Viking Press, the publisher. All footnotes are the author's except the last.

⁸ 283 N.Y. 299, 28 N.E.2d 846 (1940); see N. Y. Civ. Prac. Act § 111, and articles by Rothschild on the subject (1923) 33 Col. L. Rev. 619-624; (1924) 24 Col. L. Rev. 733-742; (1926) 26 Col. L. Rev. 33; (1927) 27 Col. L. Rev. 258, 262; Walsh on Equity (1930) 109-116. See also, *Jackson v. Strong*, 222 N.Y. 149, 118 N.E. 512 (1917).

in a situation before issue had been joined that an action brought on the wrong side of the Court required dismissal. That would seem to be contrary to an earlier case, which had been regarded as settling a problem variously treated by the lower courts in New York.⁹ It would appear that the spirit of the remedial code legislation would authorize the transfer of an action to the proper side of the court, whether before or after issue joined, with appropriate provision for amendment and for the reservation of the right, in a proper case, to demand a jury trial.

"Holdsworth, while agreeing that the union of adjective law is and should be complete, is firmly of the opinion that there should not be any fusion of legal and equitable substantive rules. This entire subject is well worth study by Judicial Councils and Law Revision Commissions.

"Maitland thought that since the Judicature Acts, equity need not be taught as a separate system. Holdsworth is eloquent in his disagreement with this view. Both are probably right in a measure so far as the immediate future is concerned. Maitland, however, makes this significant observation: 'The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice.'¹⁰ That, to the mind of the writer, indicates the future trend of the law and is directly in line with the views of Lord Mansfield.

"Holdsworth says: 'It may be that the old jurisdictional and procedural bond has been dissolved. But its effects remain. Like the forms of action, "it rules us from its grave," because it lives in the very distinct technical approach, and the very distinct intellectual characteristics, which it imposes upon those who study the principles and rules of equity.'"¹¹ With the greatest respect, it is submitted that such an attitude does much to hinder the progress sought to be achieved by the Judicature Acts.

"When a judge tries an equity cause, there is a certain quickening of the heart; the old tradition is there, the instinctive appeal to the conscience of the Chancellor, even though it is a conscience that is now fairly outlined and circumscribed by well established precedent. All the ingenuity, all the resourcefulness of the judge are called into play to avoid a result obnoxious to a sense of fairness and decency. The endeavor should be to carry that same feeling into Trial Term as well. Then will the intuitive inspirations of Lord Mansfield be realized and the true purpose of the law achieved."¹²

⁹ *Wainwright & Page, Inc. v. Burr & McAuley, Inc.*, 272 N.Y. 130, 5 N.E. 2d 64 (1936); see also *Hermes v. Compton*, 260 App. Div. 507, and the decision on reargument at p. 1027, 23 N.Y.S.2d 126 (1940); and *Fluegel v. Parkway Farm Stables, Inc.*, N. Y. Law Journ., October 14, 1941, Special Term, Westchester County.

¹⁰ Maitland, *Lectures on Equity* (1926) 20. See also Simpson, *Fifty Years of American Equity* (1936) 30 Harv. L. Rev. 171, 179, 180; Bordwell, *The Resurgence of Equity* (1934) 1 U. of Chi. L. Rev. 741.

¹¹ Holdsworth, *Equity* (Jubilee Number) (1935) 51 L. Q. Rev. 142, 160; see also, Holdsworth, *Some Makers of English Law* (1938) 201 *et seq.*

¹² Cf. Frank, J., in *Bereslavsky v. Caffey*, 161 F.2d 499, 500 (C.C.A. 2d 1947): "Defendant seems to suggest that the Rules have completely obliterated,

FIRST REPORT OF HER MAJESTY'S COMMISSIONERS FOR
INQUIRING INTO THE PROCESS, PRACTICE, AND SYSTEM
OF PLEADING IN THE COURTS OF COMMON LAW

1851. 32-34

We pass on to the important question of whether forms of action should still be retained. . . .

The necessity of adhering to these forms sometimes subjects declarations to objections on special demurrer, and has led to plaintiffs being defeated after establishing a good cause of action, on the ground that the form of action has been mistaken. It remains to be considered whether any countervailing advantage results from maintaining these forms.¹ We think not. It appears to us that if the facts which constitute the cause of action be sufficiently set forth in the declaration, all the legitimate purposes of pleading are thereby accomplished, and that to incumber the pleading with formal requirements, which afford no additional information, but which open a door to technical and captious objections, is not only useless but mischievous. We feel ourselves, however, bound to state, that much difference of opinion exists in the legal profession on this head.

for all purposes, the historic differences between 'law' and 'equity.' We cannot agree. Those who favor it should have in mind that such obliteration might deprive us of the inestimably valuable flexibility and capacity for growth and adaptation to newly emerging problems which the principles of equity have supplied in our legal system. A transplanted civilian has shown us the disadvantages of a system in which 'law' and 'equity' are fused not only in form but in substance, and another writer has pointed to the danger that, if the courts are not watchful, the procedural fusion may cause a substantive hardening of equity." The "transplanted civilian" to whom Judge Frank refers is Pekelis whom the Judge quotes as having said in *Legal Techniques and Political Ideologies*, 41 Mich. L. Rev. 665, 689, 691 (1943): "If someone were compelled to explain the essence of civil law to a common lawyer in one sentence, he could perhaps say that civil law is what common law would have been if it had never known a court of chancery. . . . The picture of conflicting and coexisting jurisdictions is . . . inconceivable to a Latin or even a German lawyer, who believes in . . . the uncompromising and sometimes cruel unity of the legal order." The "other writer" to whom Judge Frank refers is Emmeglick who, Judge Frank says, in *A Century of The New Equity*, 23 Tex. L. Rev. 244 (1945), "points, inter alia, to the fact that, after the procedural fusion in England, an English judge, sitting in the Chancery Division, said, 'This Court is not a Court of conscience . . .'. Telescriptor Syndicate Limited [1903] 2 Ch. 174, 195, 196."

¹ The New York Commissioners on Practice and Pleading could "discover in the idea that these distinctions should be retained," no "necessary connection between them and the substantial rights of the parties." They therefore proposed that no action "need be designated in any process, pleading or proceeding therein, by any name, form or distinction of action heretofore known or now existing; but that the only test of the right of the party complaining, to a remedy such as his case shall entitle him to, shall be, whether in his complaint he sets forth a sufficient legal right and a violation or withholding of such right by the party complained against." See their Progress Report, 14 (1847).

The principal objection that has been urged against any alteration in this respect is, that by abolishing forms of action causes of action would become less clearly defined.² It is said that in order to ascertain whether a party has a good cause of action the test may be applied of what form of action would be applicable to the case, and that if the facts can be moulded into any form of action, the conclusion may be drawn that there is a good cause of action. This, however, appears to us to be an unscientific method of arriving at the conclusion, which is thus attained by determining not what is or what is not actionable, but whether the facts of the case can be moulded so as to be assimilated to some precedent in the pleader's office. Besides, as it is laid down that where there is a cause of action, and no other form is applicable, an action on the case will lie, it seems difficult to see how in any case the question whether some action is maintainable can be determined merely by referring to existing forms.

No merit of distinctness as to causes of action can be attributed to the present forms; for we find that in many instances where the cause of action is essentially founded on contract, the declaration can be framed in tort for a breach of duty, instead of assumpsit on the contract—as in actions against carriers and other bailees. So also some causes of action founded on tort may be converted into contract by waiving the tort and relying on an implied promise that the defendant would do that which by law he was bound to do.

It is manifest, therefore, that as the question, whether there is a cause of action or not, must depend upon the facts and not upon the form adopted, the decision of a cause on the merits is not helped by means of these forms of action.

As far as pleading is concerned, it may be doubted whether, if our other suggestions are adopted, such a thing as a form of action will be left. The following are our reasons for thinking that practically there will not. At present the form of action appears in the writ. We have proposed, we think for undeniable reasons, that it shall be omitted therefrom. We have shown that its insertion in the writ has no operation, except to give rise to the question whether the declaration corresponds with the writ. If it does not, the defendant may complain of an irregularity within a limited time, and the proceedings will be set aside.

² *Cf.* Third Report of Commissioners on Courts of Common Law, 6 (1831): "[Fixed forms of action] tend most materially to secure that certainty in the right of action itself which is one of the chief objects of jurisprudence; they form a valuable check to vagueness and prolixity of statement; and in this and other respects they are essential to the convenient application of the rules of pleading. . . ."

But if the plaintiff escapes this difficulty, it matters not what the writ was, nor what the declaration, as the name of the form of action used in the writ never again appears in the proceedings. The stage at which it next becomes material to consider what is the form of action, appears from the consequences which we have pointed out of omitting from the declaration certain formal expressions, according as the action is in one form or another. In proposing that formal objections shall no longer be allowed, and that every declaration shall be sufficient which shall distinctly state the facts that constitute the cause of action, we in effect abolish the second occasion of objecting to a mistake in the form of action. The third way in which this question may arise is from the joinder of causes of action. We have shown that there are some which may not be joined, because they are of different forms. In proposing that this should be altered, we propose the abolition of the last occasion on which the question can arise.

It is obvious, therefore, that, if our other recommendations be adopted, forms of action will exist in name only, and, as their general effect appears to us to be mischievous, we recommend their abolition. We recommend not only that merely formal expressions shall be unnecessary, but that they shall be disused. This will have several good results; it will get rid of formal and captious objections; it will shorten pleadings, free them of their verbiage, and make them more intelligible by being more like the language of every-day use. We do not propose to abolish any particular mode of declaring, or of stating the substance of a case. Provided the unnecessary statements be omitted, the substance of the cause of action will alone remain. Take, for instance, a count in trover. The statement of the loss of the goods by the plaintiff, the finding by the defendant, and the intent of the defendant to defraud, might be dispensed with, and the real cause of action, namely, the conversion of the plaintiff's goods to the defendant's use, might be stated in a few words, as it is now. We object to forms (and more particularly forms encumbered with technicalities) being obligatory; but we approve of the adoption of precedents, concisely stating the matters of fact relied on, when they meet the particular case.

It has been frequently stated that causes of action and defence must necessarily be classified, as many, although varying in the particular circumstances, are substantially similar in character. There seems to us no reason why this should not be so under the system we propose; the only difference will be, that the classification will be the natural result of the similarity of the facts, instead of being artificial and technical.

NOTE

Progress Report of the New York Commissioners on Pleading and Practice, 14-16 (1847) ³: "The only remaining subject to which we propose to allude, and one which we deem susceptible of most thorough reform, is that of *pleading*. The pleadings in an action, as they are termed, are, in theory, and formerly were in practice, the mutual allegations of the parties. They are designed to set forth the grounds of action or defence upon which the parties respectively rely, and to present them intelligibly to the parties and to the court by which the controversy is to be determined, so that if it appear that the parties differ in their conclusions of law upon a state of facts alleged by the one and admitted by the other, the matter may be referred to the decision of the court; and that if a statement of matters of fact be alleged by the one which is denied by the other, the truth thereof may be ascertained by a jury or other proper forum, to the end that the appropriate judgment may be given thereon. These pleadings, as now used both at law and in equity, have become, by the subtleties of pleaders and the refinements of construction, so technical and intricate as to have rendered it apparent that the ends of substantial justice require the entire abrogation of the present system, and the adoption of a new one based upon the principle on which pleading was originally founded, and designed to apply to pleadings, as the only standard of their formal sufficiency, the test whether they plainly and intelligibly present the matters in issue between the parties, whether those matters involve conclusions of law or of fact. For the accomplishment of this object, we are well convinced, after most thorough consideration of the subject, no other adequate means are open to us than to provide for the entire abolition of the system, and the substitution in its place of one which shall rest upon, and at the same time fully carry out, the object for which pleading is designed. . . .

The system of pleading which we design to propose, will be substantially this: that the pleadings shall consist of a declaration and an answer, which shall set forth the facts constituting the cause of action or defence, truly, in plain and concise language, and in such a manner as to enable a person of common understanding, to know what is intended. The ingredient of truth in pleading to be attained by providing, in proper cases, for an affidavit at least of the belief that the facts alleged are true. All matters alleged on either side and not denied on the other, to be taken as true. No other pleading than the declaration and answer to be permitted, excepting where new matter is set up in the answer, in which case it may be denied by replication." ⁴

³ Taken from Report No. 202, 7 Documents of the New York Assembly, 70th Session (1847).

⁴ In their First Report (1851) the Commissioners on the Courts of Common Law recommended (p. 34) that a short statement of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the Declaration, should be delivered to the defendant and that this statement should be constructed on the principle of stating, intelligibly and not technically, the substance of the facts

SECTION 2. VARIETIES OF STATUTES AND RULES PROVIDING FOR UNIFICATION AND UNIFORMITY

MASSACHUSETTS GENERAL LAWS

Ter. ed. 1932, c. 231, § 1.

There shall be three divisions of personal actions—

First, Contract, which shall include actions formerly known as assumpsit, covenant and debt, except actions for penalties.

Second, Tort, which shall include actions formerly known as trespass, trespass on the case, trover and actions for penalties.

Third, Replevin.

NEW YORK CIVIL PRACTICE ACT

§ 8. Only One Form of Civil Action. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

§ 241. Pleadings; What to Contain. (*Supra* p. 166)

THE RULES OF THE SUPREME COURT (ENGLAND) 1883

Order I, Rule 1. All actions which, immediately before the 1st November, 1875, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, immediately before that date, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of

relied upon as constituting the plaintiff's or the defendant's case. "Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the Reply, save by special permission of a Judge; but the Judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit."

Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

Order XIX, Rule 4. Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. . . .

ILLINOIS CIVIL PRACTICE ACT

§ 1. (Scope of Act.) The provisions of this Act shall apply to all civil proceedings, both at law and in equity, unless their application is otherwise herein expressly limited, in courts of record, except . . . actions in which the procedure is regulated by special statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity shall prevail.

§ 31. (Forms of Action.) (1) Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, shall hereafter be deemed necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity.

§ 33. (Form of Pleadings.) (1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. One Form of Action. There shall be one form of action to be known as "civil action."

Rule 8. General Rules of Pleading.

- (a) Claims For Relief. (*Supra* p. 137.)
- (b) Defenses: Form of Denials. (*Infra* p. 519.)

**SECTION 3. DO THE FORMS OF ACTION "STILL
RULE US FROM THEIR GRAVES"?**

BLISS, CODE PLEADING

1894. 9.*

Although the names and forms of action have been thus abolished, it must not be supposed that the time spent in learning the distinctions indicated by them has been spent in vain.

The mere formulas are of little present practical consequence; but, aside from the importance of knowing our legal history, including the history of the law of procedure, most of these names will be in constant requisition as indicating the nature of the grievance, the evidence required, and the measure of relief. The whole case often clusters around the name; and the action is just as much an action of trover, or of replevin, or of ejectment, as though so called in the pleading. When the statute says that there shall be but one form of action, form, and not substance, is spoken of. Without classification there is no science. Such distinctions as exist in the nature of things must be recognized, and they are equally recognized whether a specific name be given to the suit or action, with a corresponding formula, or whether they arise from, and are known only by, the nature of the grievance and the character of the relief.

KEIGWIN, CASES IN CODE PLEADING

1926. 209-212.¹

The objections to the formulary system as a feature of pleading are not in their nature—and have never been considered—reasons for making a change in the substantive law, or even for any material modification of the principles of procedure. Hence it does not follow, because observance of certain fixed forms is declared unnecessary, that it is no longer requisite to state cases in conformity to the substantive law as it stood before, or that the pleader is at liberty to disregard any of the pre-existing

* By permission of West Publishing Company, the publisher.

¹ Author's footnotes omitted.

principles which make for the orderly conduct of litigation and tend to promote convenience and certainty of adjudication.

To say, for example, that in complaining of a trespass, the plaintiff need not use the phrase *vi et armis* or conform his pleading to a particular pattern of composition, is not equivalent to saying that he may recover as for a trespass without stating any act of force, or without alleging his possession and immediate injury. To abolish the distinction between the actions of debt and assumpsit does not imply that a party may sue for a debt and recover damages for a breach of an executory contract. Trespass and case are in many situations differentiated by the plaintiff's actual possession *vel non*; the abrogation of the actions falls far short of enabling a plaintiff to recover damages as for a trespass upon proof showing the property in the occupation of a third party. Nor does the abandonment of all forms warrant a plaintiff to allege one state of facts and prevail upon proof of different facts. Neither does the abolition of the formulary system import—at any rate it does not necessarily imply—that a plaintiff may so shape the statement of his case as to support recovery for a tort, and failing to prove the tort, recover as for breach of contract upon facts found in his narrative which may be pieced together so as to make a liability *ex contractu*. To emancipate the pleader from a technical and artificial literary style of stating his right does not—at least necessarily—mean that he may frame his complaint without reference to any specific legal predicate, and prevail upon any theory of law which may be found to fit so much of the facts as are proven.

The limiting legal principles which have been suggested—the requirement to state a complete cause of action, the obligation to avoid a variance, the necessity to conform to some definite doctrine of law—are, it is true, very striking features and necessary incidents of the formulary system, which gives effect to these and other principles; but the principles themselves are independent of the technical forms in which they are enveloped; the same procedural concepts exist and control the practice of law in countries which never had the common law scheme of actions. Hence the abrogation of that scheme by the codes does not—of itself, certainly—wholly emancipate the practice from the restraints embodied in the forms, or confer unlimited license upon the pleaders in Code States. It becomes necessary, therefore, to inquire how far and in what respects the liberty of stating cases under the Code is still restricted by procedural inhibitions which are independent of the formulary system.

MAWSON v. VESS BEVERAGE CO.

Court of Appeals of Missouri, 1943. 173 S.W.2d 606.¹

McCULLEN, JUDGE. Respondent, an infant, brought this suit in trespass as plaintiff, by his father as next friend, against appellant, as defendant, to recover damages for injuries to the fingers of his right hand. A trial before the court and a jury resulted in a verdict and judgment in favor of plaintiff and against defendant in the sum of \$7,000. After an unavailing motion for a new trial, defendant duly appealed.

[The plaintiff's amended petition alleged that on May 17, 1939, plaintiff lived with his parents at their home in Salt Lake City, Utah; that prior to that date defendant, without permission so to do, entered upon said premises and the premises adjacent thereto, "all owned, used and occupied by plaintiff and his said family as their home," and attached to a building metal signs advertising products of defendant known as "Bubble Up" and "Cleo Cola"; that plaintiff attempted to remove these signs and, while doing so, "one of said signs came in contact" with his right arm and hand, "whereby his right arm and hand, including the fingers thereof, were bruised and contused and cut and crushed," and he was caused to sustain a great nervous shock.]

Plaintiff alleged that he suffered and still suffers great pain; that his health, strength and endurance are permanently and greatly weakened, and his growth permanently checked, and his right hand and fingers permanently affected with stiffness and inability to hold or grasp objects, and that he has sustained permanent nervous injuries.

Defendant filed an answer generally denying the allegations of plaintiff's amended petition.² . . .

The testimony of plaintiff was to the effect that he was playing in the street near his home when two men drove up in a car and one got out and went into the house while the other got the signs and nails out of the back of the car and started to nail them up; that on the day after the signs were put up he attempted to take them down; that he succeeded, after hard work and the use of a claw hammer, in taking down the lower sign, which was the "Bubble Up" sign, but was unable to reach the top nails which held the upper "Cleo Cola" sign. He thereupon procured a chair and got upon the chair and while he was

¹ Not reported in the State Reports.

² The court's summary of the evidence other than the plaintiff's testimony is omitted.

trying to remove the nails which held the "Cleo Cola" sign at the top, and while holding to the top of said sign, the chair tipped and his hand slid along the edge of the sign, cutting his hand and fingers, severing the tendons and, according to the medical testimony, resulting in the permanent loss of from fifty to sixty per cent of the use of his right hand. . . .

Defendant offered no evidence whatsoever but requested the court, at the conclusion of plaintiff's evidence, to give and read to the jury an instruction in the nature of a demurrer to the evidence directing a verdict for defendant. The court refused to give said instruction and defendant saved its exception to such refusal.

Defendant's first contention in this court is that the trial court erred in submitting the case to the jury, the ground of its contention being that the petition wholly failed to state a cause of action against defendant on any theory.

There is no doubt that the objection that the petition wholly fails to state a cause of action may be raised for the first time in the appellate court, as defendant contends. Section 926 R. S. Mo. 1939, Mo. R. S. A. § 926; *City of St. Louis v. St. L. S. F. Ry. Co.*, 330 Mo. 499, 503, 50 S. W. 2d 637, 638; *Hudson v. Cahoon*, 193 Mo. 547, 558, 91 S. W. 72.

It is argued by defendant that no injury is alleged to have resulted to plaintiff "naturally, necessarily, directly and proximately from defendant's alleged entry," and that there being no negligence alleged, no cause of action against defendant on any theory appears in the amended petition.

In the brief of plaintiff's counsel herein it is stated: "This action is founded upon trespass." We agree with plaintiff's description of his action for a mere reading of the petition shows that it was framed solely on the theory of trespass. It is clear that no attempt was made by the pleader to state any other kind of a cause of action. It will be noted that there are no charges that the signs alleged to have been affixed to the building by defendant were in themselves dangerous or that they were likely to injure anyone. There is no charge that the signs attracted or were likely to attract children. There is no charge that the signs were carelessly or negligently affixed to the building in such a manner as to render them unsafe or dangerous to anyone; nor are there any facts stated from which an inference could be drawn that any negligence of defendant caused plaintiff's injury. We therefore proceed to determine whether

or not the petition states a cause of action in trespass, which is plaintiff's counsel's own theory of his case.³ . . .

In order to state a cause of action in trespass the petition must allege that the injury complained of was *direct* and *immediate upon the defendant's act* and not merely consequential.

The action "Trespass" takes its name from the wrongful act for which it furnishes a means of redress. The legal meaning of the word "Trespass" is any *direct* physical interference with the person or property of another. A blow to the person, a taking of personal property, and going upon the land of another, are instances of trespass. McKelvey on Principles of Common Law Pleading, 2d Ed., § 47, p. 34. The author of the above work points out that injury to the person or property may result from acts other than those stated above, such as putting an obstruction in the highway, or the negligently kindling of a fire upon one's own land which spreads to a neighbor's land, and that the last named acts are wrongful acts because they are violations of rights just as much as direct acts are, but that they are not trespasses. The author concludes his reference to the last above mentioned acts by saying: "To adopt the action of Trespass for their redress would at common law be fatal to a recovery." McKelvey on Principles of Common Law Pleading, *supra*.

The same author, after showing that the different forms of action at common law were the outgrowth of many and varied states of facts presented to courts by plaintiffs seeking redress against defendants, states that the result was a number of classes of actions, each with its separate name and form of statement, in which were included all the ordinary cases arising between litigants. He then calls attention to the development of the law and the broadening of the field of actionable wrongs, which resulted in cases being frequently presented which could not be brought within any one of the established classes of actions and yet the plaintiffs therein were clearly entitled to relief, after which he proceeds: "The plaintiffs were therefore permitted to state the facts and demand the relief to which they deemed they were entitled, and these actions were termed 'Actions on the Case,' or 'Actions of Trespass on the Case.' Later they became a class by themselves, known as 'Case,' and an action was spoken of as being brought in Case. . . ." McKelvey on Principles of Common Law Pleading, 2d Ed., § 7, p. 5.

In the case at bar, plaintiff, as we have heretofore pointed out, made no attempt whatsoever to state facts that would

³ The court's references to and quotations from various authorities are omitted.

show negligence on the part of defendant and his action, therefore, cannot be said to be in Case. On the other hand, while the petition herein alleges a wrongful entry by defendant upon plaintiff's land, it does not state that plaintiff's injuries or any injury resulted naturally, directly, proximately or necessarily from such entry; nor does it state that any injury so resulted from the wrongful affixing of the signs to the building such as that the building was damaged or its use directly interfered with in some manner, however slight. The injury complained of in the petition herein was one sustained by plaintiff when he attempted to take down the "Cleo Cola" or upper sign. Not only does the petition fail to state that plaintiff's injuries were the natural, direct, immediate and necessary result of defendant's alleged wrongful entry and putting up of the signs, but, quite to the contrary, it affirmatively shows on its face that the injuries resulted directly from plaintiff's own voluntary independent action in taking down the signs after they were put up and, in this respect, showed no liability on defendant for injury resulting from trespass. *Wecker v. Grafeman-McIntosh Ice Cream Co.*, 326 Mo. 451, 31 S. W. 2d 974. The fact that plaintiff was a minor and therefore not accountable for his actions or not chargeable with negligence is immaterial because this is not a negligence case, as we have pointed out. It is a case in trespass, and therefore neither the negligence of defendant nor contributory negligence of plaintiff is involved.⁴ . . .

Inasmuch as plaintiff contends that his petition herein is based upon trespass, and it being clear that it is not based upon any statute, it has been necessary for us to resort to the common law to ascertain the elements of trespass.

In many states, including our own, by statutory rule all wrongs and injuries done the property or person of another, where money is demanded as damages, may be redressed in an action based upon the facts of the case. It has been pointed out by a well known law writer that while the statutory rule has rendered obsolete and made unnecessary the *technical forms* of the common law declaration in the cases covered by such statutory rule, that is all that has been accomplished by that rule, because, while the ancient *forms* of pleading have been destroyed, the distinctions which the law makes in the wrongs have not been changed, nor have the names by which particular wrongs were known at the common law been changed. *Caruthers' History of a Law Suit*, 4th Ed. (1903), pp. 133, 134. Therefore, even though our code provides a simple "civil ac-

⁴ The court's discussion of *Bouillon v. Laclede Gas Light Co.*, 148 Mo. App. 462, 129 S.W. 401, 402, which the court distinguishes, is omitted.

tion" for redress of private wrongs, Section 847, R. S. Mo. 1939, Mo. R. S. A. § 847, and even though the "facts of the case" be stated in accordance with our code, Section 916, R. S. Mo. 1939, Mo. R. S. A. § 916, which requires only "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition," nevertheless, if such statement presents a good cause of action, it necessarily shows the action to be "Trespass" or "Case," or whatever else, it would have been at common law; and whatever the action happens to be, the common law, which is inherent in the particular action, will attach, to control subsequent pleadings, rules of evidence, and the rights of parties, in the absence of statutes to the contrary. Caruthers' History of a Law Suit, *supra*. In other words, while statutory codes governing pleading, including our own general code of civil procedure, have abolished the technical common law *forms of pleading* and procedure, they have not abolished or affected the substantive law by which wrongs are defined and classified with respect to the kind of remedies and actions prescribed for their redress.

No code of procedure which purports to serve the ends of justice, regardless of the particularity and minute detail with which it may attempt to provide for various proceedings, can depart from certain elementary and fundamental principles which are embodied in the common law and have been developed through ages of judicial experience. Under codes, as well as at common law, to be entitled to recover a party still must show that he is possessed of a right which has been violated by the party complained of, or his servant or agent, to the damage of the complaining party.⁵ . . .

In the case at bar the evidence is undisputed that plaintiff's act of taking down the sign on which he sustained his injury occurred many days after the signs were nailed up. It was a voluntary independent act of his own, not required by defendant or anyone else. Plaintiff's act was not the result of threats, menaces, force or fright, and it therefore cannot be said his injury resulted naturally, necessarily, directly and proximately from the unlawful putting up of the signs.

The court should have given defendant's requested instruction for a directed verdict in its favor.

The question arises as to this court's duty in disposing of the case. Should the judgment be reversed, or should it be re-

⁵ At this point there is omitted the court's discussion of two cases which "clearly illustrate the application of the rule which requires that in order to recover damages in a case of trespass the injury must be shown to be the natural, necessary, direct and proximate result of the unlawful act constituting the trespass."

versed and the cause remanded on the theory that plaintiff might possibly make out a case of negligence against defendant? We are of the opinion that we are not authorized on this record to remand the cause.

It has been held that where, as here, a complaint is framed solely on trespass and not upon negligence, plaintiff cannot, on failing to establish the trespass, recover in that suit for consequential damages claimed to have been caused by defendant's negligence. *Gordon v. Ellenville & Kingston R. R. Co.*, 195 N. Y. 137, 88 N. E. 14, 47 L. R. A., N. S., 462.

In the above case the court said: "The complaint was not framed upon the theory of defendant's negligence, but solely upon the ground of its wrongful and unlawful invasion of the plaintiff's lands. This is not an immaterial or technical variance in pleading which, under the liberal rules of the Code, may be disregarded in the interests of justice. *It involves a substantial distinction based upon well-defined legal principles which cannot be ignored.* 'Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.' *Southwick v. First National Bank of Memphis*, 84 N. Y. (420), 429." *Gordon v. Ellenville & Kingston R. R. Co.*, supra, 195 N. Y. loc. cit. 140, 141, 88 N. E. loc. cit. 15, 47 L. R. A., N. S., 462. (Emphasis ours.) See also, *Quay v. Lucas*, 25 Mo. App. 4; *Mineral Belt Bank v. Lead & Zinc Co.*, 173 Mo. App. 634, 643, et seq., 158 S. W. 1066.

Upon the record before us it is our plain duty to reverse the judgment. It is so ordered.

MARTIN v. SMITH

Supreme Court of Minnesota, 1942. 214 Minn. 9, 7 N.W.2d 481.

Two actions for trespass in the district court for Hennepin county, consolidated and treated as one, by the guardian of Edith K. Martin, incompetent, tried before Luther W. Youngdahl, Judge, and a jury. A verdict was directed for defendants, and plaintiff appealed from the judgment after denial of his alternative motion for judgment or a new trial. Affirmed.

STREISSGUTH, JUSTICE. Russell K. Martin as guardian of his incompetent sister, Edith K. Martin, brought this action for alleged trespass of defendants in occupying two rooms in the ancestral Martin home. Russell K. Martin will hereinafter be referred to as plaintiff.

Defendant Clara B. Smith is the mother, and defendant Sherman S. Smith is the brother, of plaintiff's former wife. Mrs. Smith and her son came to live with the Martins sometime in 1931 at the suggestion of Mrs. Martin, who was then expecting the birth of a child. Plaintiff concurred in the suggestion. Though the arrangement was intended to be only temporary, it actually continued for many years. For practically the entire period from December 1, 1931, to April 1, 1937, the Smiths occupied two rooms on the second floor of the Martin home, in which rooms it is claimed the incompetent, Edith K. Martin, had a life estate.

The arrangement did not prove harmonious, and from time to time after inception plaintiff requested defendants to find other accommodations. In each instance, however, the difficulties between the parties were ironed out and their original arrangement continued. Mrs. Smith testified that the requests for her to leave were always retracted by her son-in-law. Her testimony to that effect stands uncontradicted.

Plaintiff admitted that though he told Mrs. Smith and Sherman he had no right to rent the rooms on the second floor, he "agreed to let them come in" and that Mrs. Smith said "they would pay \$35 a month apiece." While defendants made no regular payments of rent in cash, they did, from time to time, make substantial contributions of money, clothing, and other items to plaintiff and his family. Plaintiff admitted that the amounts paid by the Smiths totaled over \$1,900. The Smiths claim their contributions exceeded \$4,100. Whatever the correct amount may be, the facts are undisputed that plaintiff intermittently received money, goods, and services from the defendants during the entire period of their occupancy of the two rooms and that he received such sums both before and after his several requests of defendants that they leave.

Plaintiff's wife commenced a suit for divorce on May 7, 1937, and within a short time thereafter these two separate actions of trespass, which were later consolidated, were commenced by him as guardian of his sister against Mrs. Smith and Sherman Smith respectively.

Plaintiff deliberately chose to sue in trespass rather than on contract, express or implied. His theory is that by his mother's will his sister, Edith K. Martin, was devised a life estate in the second floor of the family dwelling with an express reservation that "the second floor shall not be sublet or occupied during Edith's absence, providing she is away at school"; that because of this reservation it was illegal for him as guardian of Edith's estate to give consent to the occupancy of the second

floor by third persons or to sublet the same; and therefore that the entry of the defendants was tortious and plaintiff's remedy was trespass *quare clausum fregit*.

We deem it unnecessary to determine whether, under the will of Mrs. Martin, Edith had a life estate in the rooms on the second floor of the Martin home, or whether, as defendants claim, the will of Mrs. Martin vested in the corporate trustee named therein the title, possession, control, and management of the rooms as against Edith or her guardian. Though it be assumed that the guardian was vested with the title and right of possession necessary to maintain trespass (63 C. J., Trespass, pp. 902, 903, §§ 19, 20; 42 Wd. & Phr. (Perm. ed.) Trespass, p. 449; 2 Waterman, Trespass, pp. 447, 454, 511, §§ 987, 995, 1058; 2 Greenleaf, Evidence (16 ed.) p. 561, § 613; Kimball v. Hilton, 92 Me. 214, 42 A. 394; Palmer v. Tuttle, 39 N. H. 486; Cowenhoven v. City of Brooklyn (N. Y.), 38 Barb. 9), his action must nevertheless fail because of the total absence of a second necessary element of trespass, to-wit: wrongful and unlawful entry by the defendants upon plaintiff's possession.

The gist of the action of trespass *quare clausum fregit* is the breaking and entering *vi et armis* of the plaintiff's close. Whatever is done after the breaking and entering is but aggravation of damages. Unless the entry was forcible and unlawful, there can be no recovery. [Citations omitted.] The invasion of plaintiff's premises must be "unpermitted." Whitaker v. Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A., N. S., 921, 117 A. S. R. 703, 10 Ann. Cas. 528.

We cannot adopt the plaintiff's theory that, because of the provision against subletting or occupying the second floor during Edith's absence, any entry by the defendants, even with the consent of the legally appointed guardian of Edith's person and estate, constituted an illegal or wrongful entry. The new probate code has not changed the rule that an administrator or guardian is authorized to lease the real property of the estate for the term of the administration or guardianship. [Citations omitted.] And if it be argued that the will specifically prohibited the subletting or occupancy of the second-floor rooms during Edith's absence, it is evident that the only effect of defendants' entry and their continued occupancy of the rooms with the guardian's unauthorized consent was to create a tenancy at will under the rule that "such tenancies arise by implication of law where . . . one . . . enters under a void lease." Thompson v. Baxter, 107 Minn. 122, 124, 119 N. W. 797, 21 L. R. A., N. S., 575. [Other citations omitted.]

Lack of authority in the guardian to sublet or give his consent to the occupancy of the rooms did not render the tenancy of defendants illegal or void as against public policy but merely rendered it terminable at will. Plaintiff, as guardian, not having elected to terminate the tenancy but having recognized it until the defendants vacated the rooms, it is now of no consequence that the agreement to lease might have been avoided and the lease terminated at an earlier date. *Smith v. Park*, 31 Minn. 70, 16 N. W. 490.

Nor can plaintiff in this tort action recover the rental value of the rooms as mesne profits, for an action for mesne profits likewise springs from a trespass—an entry *vi et armis* upon premises and a tortious holding.¹ 63 C. J., Trespass, p. 1053, § 254; 2 Waterman, Trespass, p. 596, § 1160; *Roukous v. De Graft*, 40 R. I. 57, 99 A. 821; *Thompson v. Bower* (N. Y.) 60 Barb. 463, 477. Mesne profits are “a sum recovered for the value or benefit which a person in wrongful possession has derived from his wrongful occupation of the land between the time when he acquired wrongful possession and the time when possession was taken from him.” *Roukous v. De Graft*, 40 R. I. 57, 99 A. 821, 822; 27 Wd. & Phr. (Perm. ed.) p. 151.

The action for mesne profits is an emanation from the action of ejectment.

“Under the mode of proceeding by ejectment invented by Chief Justice Rolle, and introduced at an early day into this country, the plaintiff recovered the term as laid in his demise, and nominal damages only. When by this method he recovered the possession, in fiction of law, he was remitted to his original seizin, and being so, had an action of trespass to recover the mesne profits for the whole time he was out of possession.” 2 Waterman, Trespass, p. 595, § 1158.

We attach no importance to the exact common-law classification of plaintiff's purported cause of action, the common-law forms of action having been abolished in this state. Not having shown any wrongful entry or tortious holding by defendants, plaintiff has wholly failed to establish a cause of action of any variety, common-law or statutory, either in trespass *quare clausum fregit* or for recovery of mesne profits. The order directing a verdict in favor of defendants was therefore clearly correct.

Judgment affirmed.

¹ See Shipman, Common Law Pleading, 180-181, 186-188 (1923).

GOULET v. ASSELER

Court of Appeals of New York, 1860. 22 N.Y. 225.

[On March 19, 1855, Caussidiere and Bonnier mortgaged a quantity of wines, liquors, cigars and bar furniture to Goulet to secure the payment of \$1,200 to him in one year from that date, but the mortgage provided that the mortgagors were to remain in possession of the chattels until default. Defendants in this action had brought suit against the mortgagors prior to the execution of the mortgage, and they obtained a judgment shortly after its execution. Execution issued on their judgment and was levied on the mortgaged chattels which were sold pursuant to the levy on April 27, 1855. When the debt secured by the mortgage became payable, Goulet demanded the mortgaged chattels of defendants and then brought this action against defendants "for taking, selling and converting" these chattels to their use. At the trial the court instructed the jury to return a verdict for plaintiff for the value of the mortgaged chattels. Defendants appealed from the judgment on the verdict.]

SELDEN, J. If the plaintiff has any legal remedy for the injury of which he complains, it is clear that that remedy has not been properly pursued in the present case, and that the judgment therein cannot be sustained consistently with the well established principles of the common law, and the repeated decisions of this court. The difficulty in the case, and the error of the court below, will be most readily seen and appreciated by referring to some of the distinctions between those forms of action which the Code has abolished. It can hardly be claimed that, prior to the Code, an action of trespass or trover could have been maintained, either against the officer or the plaintiff in the execution, under the circumstances here disclosed. The case would have fallen directly within the principles of the case of *Gordon v. Harper* (7 Term R., 9), and the subsequent cases of that class which have never been departed from, either in England or in this country. If any action would have lain before the Code, it could only have been an action founded upon the special circumstances of the case, setting forth the injury to the contingent interest of the plaintiff in the property, and claiming damages for such injury.

While, however, in such an action, the plaintiff would have avoided the effect of the technical rule that, in order to recover in trespass or trover, he must show that he had either the actual possession or the right of the possession at the time of the alleged taking or conversion, he also, supposing that the action could have been maintained, would have imposed upon himself

the necessity of proving, specifically, the damages which he had sustained. In trespass and trover, before the Code, the plaintiff recovered, if at all, upon the ground that he was the owner of the property in controversy. The measure of damages, therefore, in all such cases, was the value of the property taken or converted. Although it appeared that the plaintiff held the title as mere security for a debt, and that his debtor was abundantly able to pay, so that his actual loss was nothing, his recovery, in cases where he recovered at all, was nevertheless for the full value of the property, provided that did not exceed the amount of his lien. In a special action on the case, on the contrary, the plaintiff could, under no circumstances, recover more than the damages shown to have been actually sustained. He must prove to what extent his security was impaired, by showing whether the debtor was or was not responsible, and whether or not it was still in his power to follow and enforce his lien against the property.

Although the Code has abolished all distinction between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these two kinds of actions as before the Code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is, the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired.

If we apply these principles to the present case, the error in the judgment under review becomes apparent. The complaint is, in substance, the same as a declaration in trover, under the former system of pleading. It is true, that it sets out the mort-

gage as well as the judgment and execution obtained by the defendants, and the proceedings under them; but the gist of each of the counts is, that the defendants have taken the property of the plaintiff, and converted and disposed thereof to their own use. The form of the complaint in this respect would be of no importance, provided the proof had been such as to entitle the plaintiff to the judgment rendered. This court will not reverse a judgment simply because the case made by the evidence varies from that set forth in the complaint, where, as in this case, no objection was taken on that account at the trial. If it appears that the proof was sufficient to entitle the successful party to the judgment actually given, such judgment will be sustained. Here, however, the proof could, at most, only authorize the plaintiff to recover the consequential damages resulting to the contingent interest under the mortgage; while the damages were assessed and the judgment rendered upon the assumption that he was the owner of the property and entitled to the immediate possession.

The distinction taken by the Superior Court between this case and that of *Hull v. Carnley* (1 Kern., 501, and S. C., 17 N. Y., 202), upon the ground that here the sale was in parcels and to different purchasers, is entirely insufficient to support the judgment. Even conceding this to have been wrongful, and a violation of duty on the part of the officer, still it could only entitle the plaintiff to recover damages for the injury to his lien, and not the entire value of the property. The objection that he had neither possession nor the right of possession at the time of the conversion, would not be removed. The judge, therefore, was clearly wrong, in directing the jury to assess the value of the property, without any proof as to the actual extent of the injury sustained.

It is unnecessary to determine whether a recovery could be had upon any other principle in such a case. This question has never yet been presented to or passed upon by this court.¹ . . .

It may be necessary, ultimately, to settle this question in the present suit, but as its determination is not essential to the disposition of the case as now presented, and as there is not a perfect unanimity of opinion in this court upon the subject, it is deemed expedient to leave the point to be settled hereafter. The judgment must be reversed and there must be a new trial, with costs to abide the event.

All the judges were for reversal upon the preceding opinion, except COMSTOCK, Ch. J., and DENIO, J.²

¹ The Court's discussion of this question is omitted.

² The opinions of Comstock, Ch. J., and Denio, J., are omitted.

SAMUELL v. MOORE MERCANTILE CO.

Supreme Court of Montana, 1922. 62 Mont. 232, 204 P. 376.

Action by P. H. Samuell against Moore Mercantile Company, the Power Mercantile Company, and Firman Tullock, as sheriff. From a judgment in favor of the Power Mercantile Company, and from an order denying a new trial, plaintiff appeals. Reversed and remanded.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

During 1914 and 1915 plaintiff was in possession of certain farming lands in Fergus county. In the fall of 1914 he seeded about 100 acres to fall wheat, and in the spring of 1915 he seeded 20 acres to spring wheat and 66 acres to oats. He gave a chattel mortgage upon these crops to secure an indebtedness of something over \$1,600 due to the Moore Mercantile Company. When the crops matured in 1915 plaintiff harvested them and in November commenced threshing. On November 18, when he had threshed only about 700 bushels of the grain, the mortgagee secured a certified copy of the mortgage, placed it in the hands of the sheriff and directed him to execute the power of sale. Acting pursuant to his instructions and the terms of the mortgage, the sheriff took possession of the crops, including the threshed grain. On November 26, and before the date of the sheriff's sale, the Power Mercantile Company, claiming to be the owner of the crops and entitled to their possession, commenced an action in the district court and secured a restraining order enjoining the Moore Mercantile Company and the sheriff from proceeding further or in any manner interfering with its free use and control of the property. Upon the service of the order the work of threshing was suspended and was never resumed, so that the unthreshed portion of the grain was suffered to lie in the field and to be destroyed by the elements. Plaintiff brought this action to recover damages and in his complaint set forth the facts much more in detail. Among other things he alleged that the value of the unthreshed crops exceeded greatly the amount due to the mortgagee. Issues were joined and the cause brought to trial. At the close of plaintiff's testimony the court granted a nonsuit as to the defendants Moore Mercantile Company and the sheriff, and at the conclusion of all of the evidence rendered judgment in favor of the Power Mercantile Company. From that judgment and from an order denying a new trial, plaintiff appealed.

Counsel for appellant have disregarded the rules of this court in the most flagrant manner. Neither of the two so-called assignments of error presents any question for review (*Rog-*

ness v. Northern Pac. Ry. Co., 59 Mont. 373, 196 P. 989), and their brief is practically devoid of argument and does not contain the citation of a single authority in support of their position. This court ought not to be called upon to do the work which counsel are employed to do, and with perfect propriety we might affirm the judgment and order without reference to the merits, and justify our decision upon reason and numerous decisions of this court and other courts of last resort; but it is apparent to us that plaintiff has suffered grievous injury in the destruction of his crops, and he should not be penalized further for failure of his counsel to discharge their duty. We therefore assume the burden of original investigation to determine the character and extent of his rights and the propriety of the remedy which he has invoked.

In a memorandum opinion filed at the time the judgment was rendered the trial court indicated that its decision was based solely upon the theory that the complaint does not state facts sufficient to constitute a cause of action, and it is apparent from a consideration of the evidence that it could not have been justified upon any other ground, for, though the evidence tending to establish the extent of the loss is meager in the extreme, it does appear to be sufficient to warrant a recovery for more than nominal damages, if plaintiff is entitled to recover at all; so that the one principal question presented may be stated as follows: Is the mortgagor of personal property out of possession after condition broken entitled to maintain an action for damages against a third party by whose wrongful acts the property is destroyed, where the value of the property exceeds the amount due the mortgagee?

The identical question was answered in the affirmative in *Frankenthal v. Mayer*, 54 Ill. App. 160, and we think upon correct principles. Under our statutes the mortgage creates only a lien. (Sec. 5736, Rev. Codes 1907.) The mortgagee is not entitled to possession before default, unless expressly authorized by the mortgage itself. (Sec. 5737.) The title to the mortgaged property remains in the mortgagor until, by foreclosure or sale, as authorized by section 5769, Revised Codes, as amended (Laws 1913, Chap. 86), it is divested. (*Demers v. Graham*, 36 Mont. 402, 93 P. 268, 122 Am. St. Rep. 384, 13 Ann. Cas. 97, 14 L. R. A., N. S., 431. Until title passes, the mortgagor has an interest to the extent, at least, that the value of the property exceeds the mortgage debt, interest, costs, etc. It follows that any unwarranted interference with the property by a third person which results in its destruction constitutes a wrong to the mortgagor to the extent of his interest, and it is one of the maxims of our

jurisprudence that "for every wrong there is a remedy." (Sec. 6191, Rev. Codes 1907.)

As indicated by its opinion, the trial court proceeded upon the assumption that this is an action in conversion, and, since the plaintiff was neither in actual possession nor entitled to immediate possession at the time of the wrongful acts of which complaint is made, he cannot maintain the action. If the premise is correct, the conclusion follows under practically all of the authorities; but it does not follow that because plaintiff cannot maintain an action in conversion he is remediless. Under our Codes, the common-law forms of action have been abolished. Section 6425, Revised Codes of 1907, provides: "There is in this state but one form of civil action for the enforcement of [or] protection of private rights and redress or prevention of private wrong."

Section 6532 provides that the complaint shall contain "a statement of the facts constituting the cause of action in ordinary and concise language." For the purpose of testing the sufficiency of this complaint, the motion for judgment interposed by the Power Mercantile Company at the conclusion of the trial had the effect of a general demurrer (*Daily v. Marshall*, 47 Mont. 377, 133 P. 681), and it is the rule in this state that, in determining whether a complaint states a cause of action, matters of form, as well as allegations not appropriate to the purpose sought to be accomplished, will be disregarded. (*Wheeler & Motter Merc. Co. v. Moon*, 49 Mont. 307, 141 P. 665.) In other words, the form in which the action is brought is altogether immaterial, for, if upon any view of the case made plaintiff is entitled to relief, the pleading will be sustained (*Raymond v. Blancgrass*, 36 Mont. 449, 93 P. 648, 15 L.R.A., N.S., 976, and the character of the action will be judged from the nature of the grievance rather than from the form of the declaration. (*Railroad Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785.) Section 6425, above, however, refers to matters of form and not to substance, and, though the form and name of the action is abolished, the distinctions between the character of different actions necessarily arise from the nature of the wrong which is suffered and the relief which is sought, so that a reference to the forms and principles of common-law pleading is frequently of aid in determining the rights and remedies of litigants. (*Maronen v. Anaconda C. Min. Co.*, 48 Mont. 249, 136 P. 968.) At common law the action on the case was the great residuary remedy in the field of torts. It was designed to afford relief in all cases where one person was injured by the wrongful act of another and no specific remedy was provided. (*Van Pelt v. McGraw*, 4 N. Y.

110.) It was not infrequently termed a "formless action," in that it was not indicative of any particular form of action, but rather of a substantive class of actions of many different species that took the name from the fact that they were not included within any of the recognized forms of writs, but were begun by writs which set forth the facts and circumstances of the particular cases. (*Cockrill v. Butler* (C.C.), 78 Fed. 679.) In Comyn's Digest, under the title "Action on the Case," it is said: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." For a further discussion of the subject, reference may be had to 1 Bacon's Abridgment, 125; 5 Petersdorff's Abridgment, 194; Andrews' Stevens' Pleading, sec. 52; 3 Street's Foundation of Legal Liability, Chap. 18; 11 C.J. 1.

In the action commenced by the Power Mercantile Company against the Moore Mercantile Company and the sheriff an appeal was prosecuted to this court, and it was determined finally that the Power Mercantile Company did not have any title to or interest in the crops in question and was not entitled to an injunction. (*Power Merc. Co. v. Moore Merc. Co.*, 55 Mont. 401, 177 P. 406.) When the Moore Mercantile Company took possession of the crops under its chattel mortgage, it owed to the plaintiff, as mortgagor, the duty to exercise reasonable care for the protection and preservation of the property (Jones on Chattel Mortgages, sec. 697), but when the restraining order was served it was prevented effectually from discharging that duty, with the resulting loss to the mortgagor. Neither the right nor the duty to preserve the property devolved upon the plaintiff. He was not in possession nor entitled to possession. His property had been taken from him rightfully, but was suffered to be destroyed without fault on his part or the part of the mortgagee in possession. Upon the plainest principles of common sense and justice, the Power Mercantile Company is liable for the damages occasioned by the mischievous agent which it set in motion without justification. The trial court erred in assuming that plaintiff's only recourse was to an action in conversion which he could not maintain because of the exigencies of the particular case. The complaint states a cause of action, in the nature of an action on the case for damages against the Power Mercantile Company, and the cause should have been decided upon the merits.

The judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*¹

¹ Cf. *Hardie v. Peterson*, 86 Mont. 150, 159-160, 282 P. 494 (1929): "It would be a sad reproach upon our judicial system to permit the defendants under

MILLAR, THE OLD REGIME AND THE NEW IN CIVIL PROCEDURE

1937. 14 N.Y.U.L.Q. Rev. 197, 200, 201-203.*

The fact has often been emphasized that the judges upon whom devolved the early administration of the New York Code were generally unsympathetic to its innovations and construed its provisions so narrowly as to prevent it from fully accomplishing the objects at which it was aimed. . . .

Detail we must forego, but it is safe to say that, although the statutes themselves are in some degree to blame, the standard set by these inauspicious beginnings largely explains why the American codes have not succeeded as well as the English Rules in reducing pleading to that purely ancillary position which it ought to occupy in the procedural scheme. . . .

A characteristic by-product of the more shackled administration of the pleadings under the American codes results from the circumstance that precisely the same set of facts may give rise to different theories of recovery. Thus the statement of the facts *qua* facts or even in conjunction with the prayer for relief, should the court be willing to look at the latter for the purpose, will not always identify the theory on which the plaintiff is seeking to proceed. And yet identification may become necessary for various reasons, as, for example, in determining, in respect of the mode of trial, whether the action is legal or equitable; in determining, in respect of the right to body execution, whether it is in tort or in contract; in determining, in respect of the measure of damages, which one of several principles, appurtenant at common law to different forms of action, is here to find application. In such cases, the courts, groping for means of identification, are disposed to attach importance to the *manner* in which the facts are stated, with reference to its greater or less approximation to the modes of allegation of the old system. From this has arisen the so-called "theory of the case" doctrine which confines the plaintiff to the identifiable theory for such purposes as those mentioned. And while, in the absence of particular exigencies of the kind, it is usually considered that the plaintiff is entitled to recover on any theory to which the facts alleged, as supported by proof, give rise, some jurisdictions there are which confine him to the identifiable theory for all purposes

the facts in this case to say to plaintiff, 'we owe you the reasonable value of the casing but the courts will not compel us to pay you because you should have sought to recover the reasonable value in some other form of action than in conversion.'"

* By permission of New York University Law Quarterly Review. All footnotes are the author's except the last.

of the case.¹ In effect, the jurisdictions last mentioned go on the ground that the defendant, as a general matter of pleading, is entitled to notice of the legal theory, as well as of the facts, upon which recovery is sought. And, however opposed to the not too carefully developed intent of the codes, this view is not without a certain justification, for it is often quite as important that the defendant be apprised of the one thing as of the other, as, indeed, he generally was under the displaced systems of pleading. In France, Italy, and Spain the pleadings are required to state the legal as well as the factual basis of proceedings.² In Scotland the same purpose is accomplished by the pleas in law of pursuer and defender.³ It would seem, therefore, that a useful reform would be here accomplished by requiring the pleader, after his statement of facts, to note summarily the legal theory or theories upon which he intends to rely, on the analogy of the Scottish plea in law, the note to be amendable in substantially the same way as the statement of facts. The English Rules no more than the American codes take the present matter into account. But the easier management of the pleadings under these Rules has prevented the development of any technical doctrine on the subject.⁴

¹ Clark, *Handbook of the Law of Code Pleading*, 176-177 (1928) [Clark, *Code Pleading*, 259-265 (2d ed. 1947).]

² Citations in Millar, *Civil Pleading in Scotland* (1932) 30 Mich. L. Rev. 741.

³ *Id.* at 562 ff., 577 ff., 736, 740-742.

⁴ Cf. Keigwin, *Cases in Code Pleading*, 235-236, 238, 240-241 (1926): "In several States it is well established that every complaint, and every defence as well, must be framed with reference to some specific and definite proposition of law, going upon the theory that such legal proposition entitles the party to recover or defend, and that the party must prevail, if at all, by establishing a case conforming to the theory of his right as indicated by his pleading. This may be, and often is, called the theory of the case doctrine; it manifestly implies that the abrogation of the formulary system of actions does not carry with it an abandonment of the fundamental principles of procedure which are embodied in that system."

"In a number of other States the theory of the case doctrine has been very positively repudiated by the courts; it is moreover quite generally condemned by writers upon Code pleading as a reversion to the abolished formulary system."

"The citations upon both sides of the question which have been made will disclose that in at least two or three States there has been a decided judicial tergiversation upon the point, whence it results that there may be more or less doubt as to what is the present law in those States. This is not because the language of the later cases is uncertain, and not always, because the actual decision is of doubtful effect; but it seems judicious to suggest that what a court has done in a given case does not always afford sure inference as to what it will do in a case involving the same principle presented in another aspect. In some other States than those mentioned there are either no rulings upon this question or rulings which leave the law more or less ambiguous."

ROGERS v. DUHART

Supreme Court of California, 1893. 97 Cal. 500, 32 P. 570.

PATERSON, J. The complaint alleges that the executors of the estate of Miguel Leonis let and demised unto the plaintiff certain lands belonging to the estate for the term of eight months from and after February 1, 1891, and thereupon plaintiff took possession of and has ever since held the same; that on February 1, 1891, the defendant "entered upon the plaintiff's said described property, and drove into and kept upon the said land about four hundred head of cattle and about three thousand head of sheep, and trod down and depastured and destroyed all the grass and herbage thereon, and so kept the said cattle and sheep upon the same continually thereafter and until on or about the seventeenth day of April, 1891, . . . without the consent of plaintiff, and to his damage in the sum of two thousand dollars."

The facts of the case are not disputed. They show that defendant had the right to pasture four hundred head of cattle upon the lands until the first day of September, 1890; that after this right expired, the executors gave him "permission to pasture upon the said lands his gentle band of cattle, consisting of fifty or sixty head, until the thirty-first day of December, 1890, in consideration of the said defendant watching over the place, and keeping the cattle of all other parties off"; that at the time of giving said permission the executors notified the defendant "that he must remove his cattle on the thirty-first day of December, 1890, and that under no consideration was the defendant, Duhart, to keep or allow any sheep to run upon the said ranch, and that was the only permission given defendant by either of the executors to be or have his cattle upon said ranch after the first day of September, 1890"; that a few days after September 1st, one of the executors told the defendant to remove his cattle from the ranch, and that he gave said executor "to understand that he had removed them, though he did not state so in so many words,—he stated that he had sold them, or was about to sell them; that the defendant permitted two thousand head of sheep, three hundred head of cattle, and twenty-five head of horses belonging to him to graze upon the land in question from January 1, 1891, until April 17, 1891; that neither the plaintiff nor the executors had knowledge of the fact that plaintiff's sheep, cattle, and horses were upon the lands subsequent to December 31, 1890, but supposed that he had removed them from the premises in accordance with his instructions, and that they did not know that he had abused the privilege granted to him on or about September 1, 1890; that the lands described in the complaint were uninclosed

pasture lands, and neither plaintiff nor any one on his behalf took possession of the land, or any part thereof, until about the twelfth day of April, 1891; that plaintiff has sustained damages in the sum of nine hundred dollars by reason of the wrongful act of the defendant, as charged in the complaint.

The briefs are devoted chiefly to a discussion of the question whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners—where the title draws to it the possession for the purpose of redressing injuries to the estate.

It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common-law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the code, and sometimes lead to serious departures from its letter and spirit. With us, mere forms of action were cast aside. Every action is now, in effect, a special action on the case. (*Jones v. Steamer Cortes*, 17 Cal. 487; 79 Am. Dec. 142; *Goulet v. Asseler*, 22 N. Y. 225; *Matthews v. McPherson*, 65 N. C. 189; *Brown v. Bridges*, 31 Iowa 145.) And the rigid formalism and subtle distinctions found in the rules governing the common-law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulae prescribed for the five forms of civil actions by the decemvirs of ancient Rome.¹

Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*.

The common-law rule is, that if plaintiff declare in trespass *quare clausum*, where the action should be *case*, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be.

The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the *case*, which includes torts

¹ See Keigwin, Cases in Code Pleading, 188-190 (1926), for another point of view.

not committed with force actual or implied, injuries committed to property of which plaintiff has the reversion only, and, in fact, all injuries not provided for in other forms of action. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action has not been changed, nor has the amount of damages recoverable been affected, but the special and technical rules which govern the use of the two common-law actions mentioned ('trespass' and 'case') have certainly been abrogated." (Pomeroy's Remedies and Remedial Rights, sec. 232.) The damages recoverable in the common-law action of trespass *quare clausum* are for the wrong done to the plaintiff's *possession*, as well as to the inheritance, and where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common-law "action of case." To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions. (Pomeroy's Remedies and Remedial Rights, sec. 232, note 2.)² . . .

In the case at bar there is no pretense that the defendant was claiming adversely to any one. He vacated the premises promptly upon receiving a written notice on behalf of plaintiff demanding possession, and so states in his answer. He was never at any time after September 1, 1890, a tenant. Admitting that when a tenancy is shown the presumption from his continued possession is that he holds in the same capacity, there is here shown an express agreement by the terms of which he was simply to have the privilege of pasturing fifty or sixty head of cattle on the land, in consideration of his services in caring for the property, and seeing that other stock did not trespass on the land. The presumption is therefore overcome. (*Bertie v. Beaumont*, 16 East 33.) Defendant contends that he was a tenant at sufferance after December 31, 1891, but this is a mistake. He was a mere servant. (*Haywood v. Miller*, 3 Hill 90; *Robertson v. George*, 7 N. H. 308.) His possession was the possession of his employer. He could not have maintained an action against any one for trespass, nor would he have been a necessary party plaintiff with the owner in a suit to recover damages for injury to the property. (*Ogden v. Gibbons*, 5 N. J. L. 534.) Whether he be regarded as a servant or licensee, the result is the same. He was there for a particular purpose, and the

² There is omitted at this point the court's discussion of certain California cases which it distinguishes.

moment he abused the privilege, or committed any act hostile to the interests of his employer or licensor, he became a trespasser. (*Lyford v. Putnam*, 35 N. H. 563; *Looram v. Burlingame*, 16 La. Ann. 199; *People v. Fields*, 1 Lans. 222; *Haskin v. Record*, 32 Vt. 575.)

Judgment and order affirmed.³

HARRI v. ISAAC

Supreme Court of Montana, 1940. 111 Mont. 152, 107 P.2d 137.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the court.

Plaintiff appeals from a judgment on the pleadings. Defendant's general demurrer having been overruled, he filed a general denial and later moved for judgment on the pleadings upon several grounds, the only one of which we need consider is that the complaint does not set forth facts sufficient to constitute a cause of action against defendant.

The complaint alleges that at the time in question defendant was the sheriff of Treasure county, Montana, and plaintiff was the owner of certain oil well pipe theretofore used by the Montana Belle Oil and Gas Company in Custer county, under a lease agreement; that in 1937 plaintiff caused the pipe to be hauled to Treasure county and stored on ranch property over which he exercised control; that on July 16, 1937, one G. W. Kirby made an affidavit for search warrant, in which he claimed that he had purchased the pipe from the above named company, that it was stolen from Custer county about June 1, 1937, and that on July 14, 1937, plaintiff admitted to affiant that he had taken the property and caused it to be hauled to the said ranch in Treasure county which he owned or claimed; that a search warrant was issued by the justice of the peace and delivered to defendant directing him, if he found the property, to bring it forthwith before him or to cause it to be guarded; that defendant proceeded under the warrant, found certain pipe at the place named, and appointed one McConnache as a watchman over it; that notwithstanding his duty defendant "either caused a motion to be made or ac-

³ Cf. Keigwin, *Cases in Common Law Pleading*, 281 (2d ed. 1934): "It is believed that even in those jurisdictions wherein the forms of action are discarded, a court would not permit a recovery where the plaintiff has declared for a grievance which in a common law State would be suable in one form and has developed a cause of action which in the common law scheme falls within the scope of another form. So far, then, as situations of this character are concerned, the formulary system operates to quite the same results which any other rational scheme would effect; and it is clear that the distinctions between the actions rest, to a certain extent at least, upon procedural principles which are necessary and independent of the reasons for the formulary system as a whole."

quiesced therein whereby an order releasing the property from his custody" was made; that defendant "well knew that plaintiff had not been notified of the fact that said search warrant had been issued in any manner and well knew that no investigation or hearing to determine the true owner of said pipe had ever been held"; that he knew or should have known the contents of the affidavit and knew the contents of the search warrant and the order of release, and that "notwithstanding that he was charged by law with the duty and responsibility of safely keeping the said property until ordered to turn the property over to the owner and in utter disregard of the law and the rights of the plaintiff herein he accepted said order releasing the property and did release the property"; that from the statements in the affidavit defendant knew or should have known that plaintiff had some title or interest in the property; "that in utter disregard of the law and in a negligent and careless manner he delivered a copy of the said order of release to G. W. Kirby to be delivered to the said Alex McConnache as authority . . . to release the property, well knowing that the said G. W. Kirby was desirous of obtaining possession" of it; "that because of the careless, negligent and unlawful handling [of] said search warrant and the property seized thereunder and because defendant carelessly and negligently gave the said G. W. Kirby a copy of said order of release for delivery to the said watchman appointed by the defendant, the defendant placed the said G. W. Kirby in a position where he could obtain possession of said property"; that Kirby took possession of the property, hauled it away and still "has it and the plaintiff has been deprived and still is deprived of his property"; that plaintiff has made demand on defendant for the property but defendant has not returned it; and that its reasonable value is \$1,330.

Copies of the affidavit, search warrant and order of release were annexed to the complaint as exhibits. The prayer was for the return of the property, or its reasonable value of \$1,330, with interest from July 17, 1940, and for \$500 exemplary damages, costs, and such further relief as the court should deem just. It was not stated when the release was made, but since the order was dated July 17, 1940, and the prayer was for interest from that date, we may assume that the sheriff's act of giving up possession happened on that date, which was the day after the search warrant was issued and served.

It is elementary that judgment on the pleadings is not warranted if the allegations of the complaint, liberally construed, state a cause of action on any theory. In this case plaintiff's theory is rather indefinite but he says in his brief: "The com-

plaint in this action alleges ownership and right of possession to the property in the plaintiff, the taking of the property from the plaintiff by the defendant sheriff and its subsequent release in violation of law. It also alleges that by reason of the subsequent release the property was lost to the plaintiff. The allegations and proof of these four elements are sufficient to constitute a cause of action and entitle the plaintiff to relief against the defendant. . . . It is our contention that the possession of this property is still in the sheriff. If the court agrees with this view then a cause of action in replevin has been stated. If a cause of action in replevin has not been stated, a good cause of action has been stated in conversion or in any event a cause of action on the case is contained in the complaint. The plaintiff is the owner of the property and entitled to possession. By reason of the act of the sheriff the property has been lost to the plaintiff."

[The court held (1) that the complaint did not state a cause of action in *claim and delivery* because "if the allegations of the complaint show that the defendant is in constructive possession of the property, they also show that his possession is by virtue of his execution" of a valid search warrant and, hence, is not wrongful; (2) that the complaint did not state a cause of action in *conversion* because if it alleged a conversion, it alleged one by Kirby rather than by defendant, and did not allege any facts "showing that defendant instigated, assisted or participated in Kirby's alleged wrongful act"; and (3) that the complaint did not state a cause of action in "the nature of *trespass* or *trespass on the case*." The legal effect of the release of the pipe by the defendant pursuant to the court order was to restore it to the plaintiff's possession, and, consequently, the complaint showed that Kirby took it from the possession of the plaintiff and not from the possession of the defendant. Assuming, therefore, that the order for the release of the property was invalid and that it was wrongful of the defendant to cause or acquiesce in the granting of the order, to release the property pursuant thereto, and to give Kirby a copy of the order for delivery to the watchman, these acts were not the direct and proximate cause of the injury of which plaintiff complained.]

For defendant's actions to constitute the proximate cause of the loss, it must not only be shown that without them the loss would not have occurred, but also that they have produced the loss without the help of any new, independent cause. Certainly under the facts alleged Kirby's act of taking the property was a new cause independent of defendant's acts; but even if that were not an insuperable obstacle to plaintiff's contentions, it cannot

be gathered from the allegations that without defendant's acts the alleged conversion by Kirby would not have occurred.

Plaintiff's argument is that by reason of defendant's acts in accepting and giving effect to the release order and giving a copy of it to Kirby for delivery to the watchman he placed Kirby in a position to take the property. Obviously defendant's acts could serve to place Kirby in a position to take it, and still not constitute acts without which he would not have taken it.

There is no allegation that but for defendant's acts Kirby would not have known of the order of release, and the presumption is clearly otherwise, since Kirby was the one upon whose ex parte application the search warrant was issued, and it was a public record (sec. 10544, Rev. Codes), which he or any other person was entitled to see (sec. 10542). We cannot conclude from the allegations that the delivery of a copy to Kirby gave the latter his only notice of the release or that he would not otherwise have known of it. The allegations on the point are merely that knowing of Kirby's desire to obtain the property, defendant gave him a copy of the release order for delivery to the keeper, and thus put Kirby "in a position where he could obtain possession" of the property. The objection is not that in notifying Kirby and not plaintiff of the release he caused plaintiff to believe that the property was still *in custodia legis*, and thus lulled him into the belief that it was still safe from seizure and removal by Kirby or anyone else, for plaintiff alleges in his complaint that the defendant knew that plaintiff had not been informed that the search warrant had been issued, and states in his brief that "defendant (obviously meaning plaintiff) had not been notified of the issuance or service of the search warrant." There can be no contention, therefore, that plaintiff was misled or discriminated against by defendant's failure to inform him of the release.

The only other possible theory upon which liability by defendant can be argued is that by allowing Kirby to deliver the release order to the keeper, defendant gave him the opportunity to be on the ground when the keeper was informed of the release so as to relinquish actual possession; but all that argument can mean is that thereby Kirby was given the first chance to get away with the property after its restoration to plaintiff's possession. The same thing would be true if the defendant had sent the notice by someone else who then wrongfully took the property. It is of course not contended that by giving Kirby the notice to deliver, defendant thereby made Kirby his agent for the conversion of the pipe. The additional fact that defendant knew from the search warrant affidavit that Kirby claimed and wanted the property would give him no reason to believe that Kirby would

take it either wrongfully or rightfully immediately upon its release to plaintiff.

Plaintiff's pleaded conclusion was that by the acts complained of defendant put Kirby in a position to take the property. But the net effect of all the facts alleged was to restore the property to the same situation in which it was prior to the execution of the search warrant; and it is inconceivable how defendant can be any more at fault for carrying out the court's order and thus restoring the prior situation than he was for the prior situation itself. The defendant's manner of execution of the release order gave Kirby no better opportunity to take the property than Kirby had before the search warrant was issued, nor than he would have had in any event after the release became effective. The wrong, if there was one, was committed by Kirby's own voluntary act after the defendant's release of the property, and no facts are alleged involving defendant in it or making him responsible for it. Certainly it would be quite revolutionary to hold that defendant had bound himself for Kirby's unlawful act, merely because by defendant's independent act, without any circumstances making him Kirby's accomplice or co-conspirator, Kirby was placed in a position where he could by his own independent volition perform the unlawful act. As well stated in 3 C. J. S., Agency, page 190, section 256, "no one ever understood that the mere fact that a person made it possible for another to commit a wrongful act bound him for such acts of the other person."

The court committed no error in granting the motion and entering judgment for defendant on the pleadings. The judgment is affirmed.

ELLENWOOD v. MARIETTA CHAIR CO.

Supreme Court of the United States, 1895. 158 U.S. 105,
15 S. Ct. 771, 39 L. Ed. 913.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Southern District of Ohio, by one Walton, administrator of the estate of Latimer Bailey, deceased, and a citizen of New Jersey, against the Marietta Chair Company, a corporation of Ohio.

The original petition contained two counts; one count alleging that the defendant, on January 1, 1875, and on divers days between that day and May 4, 1885, in the lifetime of Bailey, unlawfully and with force broke and entered upon a tract of land in the county of Pleasants and State of West Virginia,

owned and possessed by Bailey, and, by cutting and hauling timber thereon, cut up, obstructed, incumbered and devastated the land, and cut down, removed and carried therefrom a large quantity of timber, and converted and disposed of it to the defendant's own use; and the other count alleging that the defendant, on the days aforesaid, unlawfully took and received into its possession a large quantity of logs, the property of Bailey, and then lately cut and removed from that land, and converted and disposed of the same to its own use.

A motion by the defendant, that the plaintiff be required to make his complaint more definite and certain, was ordered by the court to be sustained, "unless the plaintiff amend his petition so as to show that the trespass complained of was a continuous trespass between the times mentioned in the petition."

The plaintiff thereupon, by leave of the court, filed an amended petition, containing a single count, alleging Bailey's ownership and possession of the land, and of the timber growing thereon; and that, on January 1, 1875, "and on divers other days from time to time continuously between that day and" May 4, 1885, sundry persons, knowing the land and the timber thereon to be Bailey's property, without any right or authority from him, and at the instance and for the use and benefit of the defendant, cut down and removed and sawed into logs a large quantity of the timber, and the defendant, knowing the logs to be cut from the land, and both land and logs to be Bailey's property, took the logs into its possession and converted them to its own use.

After the filing of an answer denying the allegations of the amended petition, and before the case came to trial, the court, upon Ellenwood's suggestion that Walton's letters of administration had been revoked, and Ellenwood had been appointed administrator in his stead, entered an order reviving the action in the name of Ellenwood as administrator; but afterwards adjudged that this order be set aside, and that the action be abated and stricken from the docket. This writ of error was thereupon sued out in the name of Walton, and was permitted by this court to be amended by substituting the name of Ellenwood. *Walton v. Marietta Chair Co.*, 157 U.S. 342, 15 S.Ct. 626, 39 L.Ed. 725.

Various grounds taken by the defendant in error in support of the judgment below need not be considered, because there is one decisive reason against the maintenance of the action.

By the law of England, and of those States of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be

brought within the State in which the land lies. [Citations omitted.]

The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. [Citations omitted.]

But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States*, 11 How. 229; *Eames v. Prentice*, 8 Cush. 337; *Howe v. Willson*, 1 Denio 181; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Merriman v. McCormick Co.*, 86 Wisconsin 142, 56 N. W. 743. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea. *British South Africa Co. v. Companhia de Mocambique*, (1893) App. Cas. 602, 621; *Weidner v. Rankin*, 26 Ohio St. 522; *Youngstown v. Moore*, 30 Ohio St. 133; Ohio Rev. Stat. § 5064.

Judgment affirmed.

BRUHEIM v. STRATTON

Supreme Court of Wisconsin, 1911. 145 Wis. 271, 129 N.W. 1092.

KERWIN, J. The complaint in this action stated that the plaintiff was the owner of certain lands in Minnesota and that between November, 1903, and March, 1904, the defendant unlawfully and wrongfully entered upon said land and without authority wilfully and wrongfully cut standing live timber growing thereon and wilfully and wrongfully took and carried the same away and converted the same to his own use, to the great injury and damage of the plaintiff, and further alleged the value of said timber converted, and demanded judgment for that amount and also treble said amount as damages under the Min-

nesota statutes. The complaint also contains allegations setting up the statutes of Minnesota respecting wilful trespass and single and treble damages. The defendant answered admitting that the Minnesota statutes set up in the complaint were in full force and effect in the state of Minnesota as alleged in the complaint, and denied every other allegation of the complaint.

The court below sustained an objection to any evidence under the complaint for the reason that it was not a complaint in trespass upon lands in Minnesota, therefore the court had no jurisdiction of the action, and denied the application of the plaintiff to amend the complaint on the ground that it had no power or jurisdiction to allow such amendment, for the reason that, the cause of action being one in trespass, the complaint could not be amended so as to set up a cause of action for conversion of the timber cut.

We think the court below erred in both particulars. In the first place there were sufficient allegations in the complaint to make a good cause of action in conversion, and what the idea of the pleader was when he drew the complaint was immaterial. If the allegations were sufficient to constitute a cause of action in conversion the plaintiff was entitled to have it treated as such by the court, and the fact that the court had no jurisdiction of the action of trespass upon the land in another state rendered the allegations respecting a cause of action in trespass merely surplusage, and, there being sufficient allegations aside from these to make the complaint one in conversion, it should have been so treated by the court.¹ . . . Doubtless the complaint as originally drawn would have been subject to a motion to make more definite and certain or to strike out the surplus allegations, but no such motion was made and defendant answered on the merits.² . . .

Respondent relies upon *Joseph Dessert L. Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237. It will be observed, however, that was an action brought for trespass upon land in Wisconsin, which action the court had jurisdiction of. Moreover the strict rule laid down there has not been followed by this court. In *Bieri v. Fonger*, [139 Wis. 150, 120 N. W. 862], the court said (page 155):

"In the light of the very liberal rules for testing the sufficiency of pleadings and proceedings which have been declared in recent years and the progressive tendency to broaden the judicial vision as to the scope of sec. 2829, Stats.

¹ Citation of Wisconsin precedents omitted.

² Citation of Wisconsin precedents omitted.

(1898), aforesaid, the criticism in *Joseph Dessert L. Co. v. Wadleigh, supra*, would hardly be made today. The general spirit of the decision as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, by the particular cause of action he intended to plead, is not in strict harmony with the later-day expressions and decisions."

It was also within the power of the court to allow the amendment which plaintiff asked, setting out the conversion more definitely. The cause of action set up in the complaint was a tort action, whether for trespass or conversion, and the power of the court to change from a cause of action in trespass to one in conversion, we think is clear. It follows that the court erred in sustaining the objection to any evidence under the complaint and also in refusing the amendment.

By the Court. The judgment below is reversed, and the cause remanded for further proceedings according to law.³

BARNES v. QUIGLEY

Court of Appeals of New York, 1874. 59 N.Y. 265.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The complaint in this action, in substance, alleged, that on the 3d day of April, 1871, plaintiff was the owner of a promissory note made by defendant, payable to the order of Britton & Co., for \$2,165.86; which was indorsed by the payees and transferred to plaintiff before maturity; that prior to its maturity the payees failed and made an assignment; that on or about the day mentioned, defendant, for the purpose of deceiving plaintiff and inducing him to surrender up the note for a less sum than was due thereon, falsely and fraudulently represented that the note was made by him solely for the accommodation of the payees, he receiving no consideration whatever therefor, and that all moneys paid by him upon the note would be an entire loss, whereas the note was in fact for merchandise sold by the payees to defendant, and that he received full value for the note. That plaintiff relying upon said representations, and being ignorant of the facts, was induced thereby and did accept \$582.70 less than the amount due, and surrendered up the note.

³ The dissenting opinion of Barnes, J., is omitted.

That by reason of the premises said plaintiff has been deceived and defrauded by said defendant out of said sum of \$582.70, and has sustained damage to that amount.

Defendant's answer admitted the allegations of the complaint as to the making, indorsement and transfer of the note, the failure of the payees, and that he paid the sum of \$1,600 in full settlement of the note, which was surrendered up to him. He denied all the other allegations of the complaint. On the trial plaintiff moved for judgment on the pleadings, which motion was granted, and directed a verdict for the balance unpaid on the note, to which defendant's counsel duly excepted.

ALLEN, J. The complaint is for fraud, and not upon contract. Whether the facts stated constitute a cause of action is not material. The whole frame-work is in fraud, and the cause of action, as set forth, is based upon the false and fraudulent representations of the defendant, by which the plaintiff was induced to surrender and give up to the defendant his promissory note, held and owned by the plaintiff, for an insufficient consideration, an amount considerably less than its face, by reason whereof, as alleged, the "plaintiff has been deceived and defrauded out of said sum of \$582.70, and has sustained damage to that amount."

The theory of the plaintiff at the commencement of the action, and the foundation of his claim as formally made in his complaint, was, that a surrender of the note upon the receipt of an agreed sum, less than the amount actually due in satisfaction for the full sum, was equivalent to a release under seal, and effectually discharged the debt. In that view he could only recover by impeaching the release and discharge, for fraud, and he framed his complaint to meet the case in that form. His whole cause of action rested upon the alleged fraud, and it was an entire change of that cause, and a surprise upon the defendant, when this view was ignored by the counsel and the court at the trial, and a verdict ordered upon a denial in the answer of the only material allegations of the complaint. We are not to speculate upon the question whether the surrender of the note did discharge the obligation. The plaintiff assumed that it did, and brought his action to recover for the fraud by which the discharge was procured. It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations—those which characterize and give form to the action—because, perchance, there may be facts stated by way of inducement spelled out, which would, when put in proper form, have sustained an action of assumpsit.

The defendant was called upon to answer the allegations of fraud, and not to resist a claim to recover in assumpsit. The two forms of actions might require very different defences. This is not the case of an obligation or contract fraudulently incurred, in an action upon which the fraudulent acts of the obligor or promissor are averred, which, as they do not enter into the contract, and are not essential to the cause of action, may and should be rejected as surplusage, as in *Graves v. Waite* (59 N.Y. 156), recently decided by this court. The plaintiff was not, under the complaint, entitled to a verdict and judgment, as in an action upon the note. The defendant, in preparing his answer and putting in his defence, was as unconscious of any necessity of stating and setting up any defence he might have to the note, as the framer of the complaint was innocent of any intent to make a case for a recovery upon the note, as a valid and subsisting obligation. While the Code is liberal in disregarding technical defects and omissions in pleadings, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint. (Code, § 173; *DeGraw v. Elmore*, 50 N.Y. 1; *Ross v. Mather*, 51 id. 108; *Elwood v. Gardner*, 45 id. 349.)

The judgment must be reversed and a new trial granted, costs to abide the event.

KNAPP v. WALKER

Supreme Court of Errors of Connecticut, 1900. 73 Conn. 459, 47 A. 655.

ACTION to recover damages for breach of contract and for fraud in an exchange of horses, brought originally before a justice of the peace and thence, by the defendant's appeal, to the Court of Common Pleas in Fairfield County and tried to the court, *Curtis, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The complaint alleged that the defendant owned a gray mare which he represented to be worth \$100, which he offered to exchange for a gray horse owned by plaintiff, of the value of \$100; that by agreement with the defendant, the plaintiff, believing the statements of the defendant to be true, left his gray horse at a certain livery stable, where it was taken by the defendant, but that the defendant failed to leave his gray mare at said place, as had been agreed, but left a bay mare which was of no value and which afterwards died; that plaintiff im-

mediately, when said bay horse was brought to his house by his hired man, notified the defendant that the bay mare was unsatisfactory.

Paragraphs 7 and 8 of the complaint were as follows: "7. The defendant at the time the agreement was made did not have the gray mare in his possession, and did not intend to deliver the same as he had agreed, but falsely and fraudulently represented to the plaintiff that he had such a gray mare and that he would deliver the same as aforesaid, and thereby induced the plaintiff to part with his said horse. 8. The defendant made said statements knowing them to be false, with intent thereby to make said exchange and defraud him."

The complaint asked for \$100 damages.

The answer denied the material allegations of the complaint.

The court found the facts substantially as alleged in the complaint, excepting that paragraphs 7 and 8 were untrue, and found that the gray mare, which the defendant had promised to deliver to the plaintiff, was at the time of the exchange of the value of \$30.

The defendant claimed that from the averments of the complaint the action was for damages for the alleged fraud of the defendant; and that since the complaint contained but a single count alleging fraud, it could not properly be interpreted as also describing a cause of action upon a contract for which the plaintiff could recover after having failed to prove the fraud alleged. The court overruled said claims and rendered judgment for the plaintiff for \$30.

HALL, J. A cause of action for breach of a contract for the exchange of personal property, and one for fraud in inducing the plaintiff to part with his property by means of false representations, may be united in the same complaint when both causes of action arise "out of the same transaction or transactions connected with the same subject of action." General Statutes, § 878.

Though different rules of damages may be applicable to the two causes of action, yet when a recovery can be had upon but one, and both arise "out of the same transaction or transactions connected with the same subject of action," they may both be stated in one count. *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 562.¹

¹ Cf. *Makusevich v. Gotta*, 107 Conn. 207, 208, 139 A. 780 (1928): "As the claims were necessarily inconsistent, it would have been better practice to have stated them in the alternative."

The complaint before us, containing but one count, describes a cause of action for fraud. It alleges that the defendant by certain false and fraudulent representations, which are set forth, induced the plaintiff to part with his horse of the value of \$100. It also describes a cause of action for breach of contract. It alleges that the defendant failed to perform his agreement to deliver a certain gray mare in exchange for the horse which he had received from the plaintiff. The dealings between the plaintiff and defendant with reference to an exchange of horses was the transaction out of which both the alleged causes of action arose, and a statement of all the claimed facts of the entire transaction therefore involved a statement of both of said causes of action.

Under our practice the plaintiff had the right to state in one count the entire transaction, and to submit to the court the question whether, upon the facts, he was entitled to recover the value of the horse which he had delivered to the defendant, upon the ground that he had been induced to part with it by the defendant's fraud, or only the value of the horse which the defendant had promised to deliver to him in exchange, upon the ground that his only right of action was for breach of contract.²

The court having found that the defendant failed to perform his agreement, but that there was no fraud in the transaction, properly rendered a judgment for damages for breach of contract. *Craft Refrigerating Machine Co. v. Quinipiac Brew-*

² Cf. Keigwin, *Cases in Common Law Pleading*, 282-283 (2d ed. 1934): "[A] man enters upon your premises, breaks into your stable, leads away your horse, detains the beast against your demand, and afterward sells it for money. You are plainly entitled to some remedy, manifestly to a multiplicity of remedies; indeed your rights to redress and your grounds of complaint are so kaleidoscopic as to be actually confusing. For what is it that you wish? damages for the trespass to your land, or for the taking of your personal property, or for the conversion of it? or should you prefer to recover your horse? or the price that the tortfeasor had for it? Apparently the simplest solution of the situation, and perhaps the theoretically desirable procedure, is just to tell your story to the court and let the judge render such remedy as best suits the justice of the case. But that method presents difficulties. The judge, not being always a clairvoyant, cannot divine what is in your mind as to the particular wrong which especially grieves you or as to what you want—whether to get back your horse, or damages for one of the three torts which you show committed, or merely the value of your property. The defendant, too, will be perplexed by the manifold liability asserted against him and the ambiguity of your demand for redress. Is he charged as a trespasser upon your real property, or upon personal, or for conversion, or upon an implied contract to pay for what he took? Or is he required to give up the horse?"

"Upon the answers to these and such questions depend many things—things that are fundamental, substantial and pre-eminently practical; the *quantum* and character of proof to be made by the plaintiff, the defences available to the other party, the measure of damages, the form of relief, sometimes the mode of trial, the liability of the defendant to be arrested, the amount and kind of his property that may be taken to satisfy the judgment." See also Keigwin, *Cases in Code Pleading*, 194-195 (1926).

ing Co., 63 Conn. 551; *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 470.

There is no error.³

³ For recent applications of the rule of this case, see *Personal Finance Co. v. Lillie*, 129 Conn. 290, 27 A.2d 794 (1942); *Makusevich v. Gotta*, *supra* note 1; *Raymond v. Bailey*, 98 Conn. 201, 118 A. 915 (1922); *Kaptizke v. F. Mills Co.*, 6 Conn. Supp. 418 (Super. Ct. 1938).

Part V

THE LEGAL AND FACTUAL CONDITIONS
OF AVOIDING A REMEDY

BOOK I. DEFENSES IN POINT OF LAW

Chapter IX

SUBSTANTIVE INADEQUACY

SECTION 1. THE GENERAL DEMURRER AND
ITS ANALOGUES

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

Supra, p. 186

NOTE ON THE ORDER OF INTERPOSING DEFENSES

Stephen, the foremost analyst of common law pleading, conceived the objects of pleading to be, to bring the parties to issue and to an issue "material, single and certain in its quality," and "the avoidance of obscurity and confusion,—of prolixity and delay." He therefore classified the principal rules of common law pleading in relation to these ends.¹ His first class consisted of "rules which tend simply to the production of an issue," and he stated the first of these as follows: "After the declaration, the parties must at each stage demur,—or plead by way of traverse or by way of confession and avoidance."² According to

¹ Stephen, Pleading, * 147-* 148 (Williston's ed. 1895).

² *Op. cit. supra*, at * 151. Cf. *Havens v. Hartford and New Haven Railroad Company*, 28 Conn. 69, 89-90 (1895): "*Gould*, in his treatise on *Pleading*, p. 46, sec. 43, says, 'A demurrer to the declaration is not classed among pleas to the action not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not therefore regarded as strictly a plea of any class, but rather as an excuse for not pleading.' So on page 460, 'To demur is to *rest* or *pause*.' And again, 'A demurrer merely advances a legal proposition—it forms an issue in law; admitting the facts, so far as well pleaded, for the purpose of taking the opinion of the court preliminarily, its language is, allowing all that is alleged to be true, there is not anything that calls for an answer, plea or defense.' If this is indeed true of the declaration or of a plea, then it is advisable, all will admit, that the question of law be settled in the first instance, for thereby a protracted and expensive trial of fact may be avoided, even though in many cases relief may be had by motion in arrest or motion in error." Cf., also, Clark, *Code Pleading* 504-505 (2d ed. 1947): "The

Stephen, this rule had two branches: The party must demur or plead. "One or other of these courses," he said, the party "is bound to take (while he means to maintain his action or defence) until issue be tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary; in the former case, as by confession,—in the latter, by non pros. or nil dicit."³ And if he pleads, "it must be either by way of traverse or confession and avoidance. If his pleading amount to neither of these modes of answer, it is open to demurrer on that ground."⁴

The second of Stephen's classes consisted of rules "which tend to produce singleness or unity in the issue," and one of them, as he stated it, is that "it is not allowable to plead and demur to the same matter . . . lest an issue in fact and an issue in law, in respect of a single subject, should be produced. The party, therefore, must make his election."⁵

According to Clark⁶ it is still the rule in most jurisdictions that a party must demur or plead and that he may not do both at the same time. But he points out that some codes "expressly authorize the use of the two pleadings together."⁷ This he regards as desirable because of "the advantage of getting all objections, both of fact and of law, definitely of record as soon as possible." Moreover, what he considers as "the most advanced procedure tends to force the consideration of all these issues at one time in probably the greater number of cases." As he says, under this procedure the issue of law can be brought up in advance of trial only by permission of the court.⁸

codes ordinarily state either that 'the only pleading on the part of the defendant is either a demurrer or an answer,' or else give in full the pleadings permitted by either party including therein the demurrer. This would seem to end the more or less academic dispute sometimes indulged in as to whether a demurrer is a *pleading* or merely a *refusal* to plead."

³ See *Lamphear v. Buckingham*, *infra* p. 366.

⁴ Stephen, *op. cit. supra*, at *150-*151.

⁵ *Id.* at *314. Cf. Clark, Code Pleading, 510 (2d ed. 1947): "It was a strict rule of the common law that [a party might not plead and demur at the same time] for it involved the inconsistency of simultaneously admitting and denying or otherwise contravening the opponent's statements of fact."

⁶ *Id.* at 510-511.

⁷ See, e.g., Nev. Comp. Laws Ann. § 8598 (1929): "The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein and answer the residue; or may demur and answer at the same time"; Ark. Dig. Stat. § 1415 (1937): "The defendant may demur to one or more of the several causes of action alleged in the complaint, and answer to the residue."

⁸ See Fed. R. Civ. P., 12 (b), *infra* p. 374.

STEPHEN, PLEADING

Williston's ed., 1895. * 48-* 49, * 151-* 152.*

The plaintiff having *declared*, (i.e. delivered his declaration,) it is for the defendant to concert the manner of his defence. For this purpose, he considers whether, on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of *law*, to the redress he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this by defect either in the *substance* or the *form* of the declaration, i.e. as disclosing a case insufficient on the merits, or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. In so doing, he is said to *demur*; and this kind of objection is called a *demurrer*.

A demurrer (from the Latin *demorari*, or French *demorrer*, to "wait, or stay,") imports, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer. . . .

A demurrer may be for insufficiency either in *substance*, or in *form*; that is, it may be either on the ground that the case shown by the opposite party is *essentially insufficient*, or on the ground that it is stated in an *inartificial manner*; for "the law requires in every plea" (and the observation equally applies to all other pleadings) "two things;—the one, that it be in matter sufficient—the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer."¹ And we may here take occasion to remark, that a violation of any of the rules of pleading that will be hereafter stated, is, in general, *ground for demurrer*; and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only.

A demurrer, as in its *nature*, so also in its *form*, is of two kinds: it is either *general* or *special*. A general demurrer excepts to the sufficiency in general terms, without showing specifically the nature of the objection; a special demurrer adds to this, a specification of the particular ground of exception. . . . A general demurrer is sufficient, where the objection is on matter of *substance*.

* This and all other extracts from this work quoted in this book are included by permission of the Harvard Law Review Association, the publisher.

¹ Per Lord Hobart, *Colt v. Bishop of Coventry*, Hob. 164. [All other footnotes of the author and the editor have been omitted.]

FORMS OF GENERAL DEMURRER TO A DECLARATION

In the K. B. (or "C. P." or "Exchequer.") ²

——— Term, 48 Geo. III.

C D } And the said C D by E F, his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says, that
A B } the said declaration, (or "*the said first count of the*
said declaration,") and the matters therein contained, in manner
and form as the same are above stated and set forth, are not
sufficient in law for the said A B to have or maintain his afore-
said action thereof against him the said C D, and that he the
said C D is not bound by the law of the land to answer the same,
and this he is ready to verify; wherefore, for want of a suf-
ficient declaration (or "*first count of the said declaration*") in
this behalf, the said C D prays judgment, and that the said A B
may be barred from having or maintaining his aforesaid action
thereof against him, &c.

In the Queen's Bench.³

The ——— day of ———, in the year of
our Lord ———.

C.D. }
ats. } The defendant, by ——— his attorney, (or, in person,)
A.B. } says that the declaration is not sufficient in law.⁴

LAMPHEAR v. BUCKINGHAM

Supreme Court of Errors of Connecticut, 1866. 33 Conn. 237.

BUTLER, J. . . . Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion. . . . To this syllogism the defendant must answer according to the rules of law. If he *expressly* admits on the record the law and the fact, both premises, he consents to the conclusion, the judgment, or as it is technically expressed, "*confesses judgment.*" If he declines or omits to appear pursuant to the summons, or appearing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows tech-

² From 2 Chitty, Pleading, * 678 (2d Amer. ed. 1812).

³ From Stephen, Pleading, * 49 (Williston's ed. 1895).

⁴ The form of a demurrer is fixed by Rule of Court, H. T. 4 Will. IV, founded on the Second Report of Common Law Commissioners, 84.

nically as a judgment by default, pursuant to a necessary rule of law.¹ . . . And so he may deny the major premise, the proposition of law involved, by a demurrer, and failing thereby to deny and passing over the facts, if well pleaded and sufficient to constitute a premise, *he defaults as to them*, and thereby and by the same rule is holden to have admitted them; and if the issue in law is found true, final judgment passes for the plaintiff.² The facts if well pleaded and sufficient are admitted, not because the demurrer admits them expressly or by force of any office it performs, but because the defendant has not denied and has defaulted them. A defendant therefore who demurs to a declaration admits, not by his demurrer but by his omission to deny them, all the material well pleaded facts alleged in it; and when his demurrer is overruled the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is, that in one case he denied the major premise of law and it has been found true, and, the minor having been admitted by a failure to deny, both are to be holden true; in the other he denied neither, and therefore both are to be holden true.

The condition of a case before the court after demurrer overruled and after default being precisely the same, and the effect of demurring or defaulting being precisely the same in admitting the facts, the question as to both is answered by what the law is as to either. What then is the effect of a default? What facts does it admit? . . . The true rule is that it admits the cause of action *as alleged*, in full, or to some extent, according to the nature of the action. As it admits all the *material* facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain *without further inquiry*, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and

¹ With respect to judgments by confession and by default, see 1 Black, Judgments, § 15 (2d ed. 1902).

² But see Martin, Civil Procedure at Common Law, 202 (1905): "[T]he courts formerly denied amendment after demurrer, without the consent of the adverse party. The demurrant had to submit to the judgment suited to the nature of the issue. This harsh rule, which there is good reason to believe grew up in derogation of the simplicity of the ancient law, came to be relaxed in more recent times. According to the settled rules of modern practice, irrespective of the statutes of amendments, either party after demurrer or joinder in demurrer was at liberty to amend as a matter of course, while the proceedings were on paper and before recording. In like manner the demurrant was allowed to withdraw his demurrer after argument and plead to the merits. But after the proceedings were entered of record, the action of the courts in allowing amendments was governed by the statutes of amendments, and was exercised in obedience to judicial discretion. By the Common Law Procedure Act of 1852, the courts were vested with ample authority to allow amendments in furtherance of justice at any stage of a case, thereby relieving the parties from the injurious consequences of the strict rule at common law directing judgment on demurrer."

of the damage to be recovered, then it admits the cause of action, but not to the *extent alleged*, and subject to such inquiry. Thus, if it be debt on bond for a sum certain the whole is admitted, and no further inquiry is had, and so if assumpsit on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount claimed are admitted. The note must be produced but need not be proved. *Green v. Hearne*, 3 T. R. 301; *Roscoe Ev.*, 10 ed. 71. But in actions of tort for unliquidated damages a *different* rule is *necessarily* applied. In such actions the plaintiff does not declare for a specific thing but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage as he will, and recover by proving any amount however small if sufficient to sustain an action. A defendant therefore in an action of tort is not holden to have admitted by his default the *extent* of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so, and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. . . .³

NOTE ON ISSUES OF LAW

As we have seen, both at common law and under American codes of civil procedure it is a defense to an action that a declaration or complaint does not state facts sufficient to constitute a cause of action,¹ and under the Federal Rules of Civil Procedure, that the complaint does not state a claim upon which relief can be granted.² We have also seen that the question whether a complaint states facts sufficient to constitute a cause of action or a claim upon which relief can be granted, is a question of substantive law: It is the question whether or not the major premise of the complaint, the rule which is implicit in its allegations, is a valid rule of substantive law.

³ Cf. Martin, *op. cit. supra*, at 201-202: "When a demurrer was joined on any of the pleadings in chief or other pleadings which went to the action and not in mere abatement thereof, the judgment was, if for the plaintiff, that he should recover (*quod recuperet*); if for the defendant that he should go without day (*quod eat sine die*). . . ."

"The foregoing judgment on the merits of the case was either *interlocutory* on its first rendition and afterwards made *final* upon assessment of damages, or *final* in the first instance when rendered on a liquidated demand, requiring no assessment of damages."

¹ See, for example, *Keister's Adm'r v. Keister's Ex'rs*, *supra* p. 145; *Bowen v. Mewborn*, *supra* p. 172; *Thibault v. Lalumiere*, *supra* p. 179; *Buskey v. New England Telephone & Telegraph Co.*, *supra* p. 183.

² See, for example, *Sidis v. F-R Publishing Corporation*, *supra* p. 156.

The common law general demurrer is the prototype of all procedural devices for interposing the defense that a complaint does not state facts sufficient to constitute a cause of action, or, in traditional terms, that it is insufficient in law. As *Lamphear v. Buckingham* reminds us, a demurrer interposes this defense by denying that the major premise of the complaint is a valid rule of substantive law. Analogically, therefore, it may be said that an issue of law is created by the affirmation and denial of a statement, elementary or general, about a matter of law. An issue is thus seen to be an opposition between litigants which arises whenever they give opposite answers to a question. If the question asks about a matter of law the resulting issue is an issue of law, either of substantive law or of procedural law, but if the question asks about a matter of fact the issue is an issue of fact. The prototype of all procedural devices for creating an issue of fact is the traverse.

Issues of law and issues of fact are alike in that both are constituted of alternatives but, since an issue of fact is a theoretical problem and an issue of law is a practical problem, the nature of the alternatives is different. As we have seen, a theoretical problem seeks knowledge; and the alternatives of which an issue of fact are constituted are opposite, that is, contradictory propositions. But a practical problem seeks a course of action; and the alternatives of which an issue of law is constituted are opposite rules, commands or decisions. The solution of an issue of either sort involves a choice between the alternatives of which it is composed. The rational method of solving an issue of fact is the proof and disproof of the contradictory propositions which form the issue, and it is solved by an act of the intellect, the assertion of a proposition. The rational method of solving an issue of law is deliberation, that is, the calculation of the advantages and disadvantages of pursuing the alternative courses of action, and it is solved by an act of the will, prescribing, ruling, commanding or deciding.

Contemporary procedural devices for interposing the defense that a complaint is insufficient in point of substantive law are the demurrer, the motion for judgment, the motion to strike, and the objection or answer in law.

GENERAL STATUTES OF NORTH CAROLINA 1943

§ 1-127. Grounds for. —The defendant may demur to the complaint when it appears upon the face thereof, either that:

1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,

2. The plaintiff has not legal capacity to sue; or,
3. There is another action pending between the same parties for the same cause; or,
4. There is a defect of parties plaintiff or defendant; or,
5. Several causes of action have been improperly united; or,
6. The complaint does not state facts sufficient to constitute a cause of action.¹

§ 1-133. Grounds Not Appearing in Complaint.—When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer.

§ 1-134. Objection Waived.—If objection is not taken [to the complaint] either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action.

NOTE

Clark, Code Pleading, 521 (2d ed. 1947)*: "The demurrer for insufficiency of facts is the most usual and far-reaching of all objections. It is designed to raise the question whether the opponent has a substantive right to relief, or a defense, as the case may be; and when it operates most effectively it should make it possible to dispose of an important, perhaps controlling, issue of law in advance of trial. In practice it will more often raise such issues as which party shall have the burden of alleging, and probably also of proving, certain allegations of importance in the particular case. Hence the operation of this demurrer will depend, on, first, the substantive rules of law applicable in a case and, second, the rules which govern the allegations of the complaint or the affirmative allegations of the answer."

NEW YORK CIVIL PRACTICE ACT

§ 277. Demurrer Abolished; Objections to Pleadings, How Taken. The demurrer is abolished. An objection to a pleading in point of law may be taken by motion for judgment as the rules provide.

¹ Clark, Code Pleading, 505-506 (2d ed. 1947): "These six grounds are repeated in practically all the codes and in most cases with no additions. Some include *misjoinder* of parties as a separate ground, a few that the action was not commenced within the time limited by law, a few that the complaint is ambiguous, unintelligible, or uncertain, and one that a complaint based on contract does not make clear whether the contract is written or oral. One state provides for a demurrer to the relief."

* This and all other extracts from this work quoted in this book are included by permission of West Publishing Co., the publisher.

§ 278. Certain Objections; When Waived. An objection on either of the following grounds, appearing on the face of a pleading, is waived unless taken by motion:

1. As to the complaint: (a) that the court has not jurisdiction of the person of the defendant in cases where jurisdiction may be acquired by his consent; (b) that the plaintiff has not legal capacity to sue; (c) that another action is pending between the same parties for the same cause; (d) that there is a misjoinder of parties plaintiff; (e) that there is a defect of parties, plaintiff or defendant.

2. As to a counterclaim: (a) that the defendant has not legal capacity to recover upon the same; (b) that another action is pending between the same parties for the same cause; (c) that the counterclaim is not one which may be properly interposed in the action.

§ 279. Certain Objections Not Waived. An objection as to the jurisdiction of the court, except as otherwise provided in the preceding section, and the objection that a complaint, or a statement therein of a separate cause of action, or a counterclaim, does not state facts sufficient to constitute a cause of action, or that a defense is insufficient in law upon the face thereof, are not waived by failure to raise the same before trial.

NEW YORK RULES OF CIVIL PRACTICE

Rule 106. Motion for Judgment on the Complaint. After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties for the same cause.

5. That the complaint does not state facts sufficient to constitute a cause of action.

A notice of motion specifying an objection set forth in subdivisions 1, 3 or 4 hereof shall be served within twenty days after the service of the complaint. A notice of motion specifying an

objection set forth in subdivision 2 or 5 hereof may be served at any time prior to trial.¹

THE RULES OF THE SUPREME COURT, 1883 (ENGLAND)

Order XXV, Rules 1-3.

1. No demurrer shall be allowed.
2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
3. If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just.

NOTE

Clark, *Code Pleading*, 537-539 (2d ed. 1947): "The primary purpose of the demurrer is to raise legal issues apart from issues of fact and thus render a trial on the facts often unnecessary. In only a relatively small number of cases is this purpose achieved. More often the demurrer is used to raise questions as to form and sufficiency of the pleadings, which merely lead to amendment. The result is delay—which may be what the demurrant is really after—and at most a mere perfecting of the pleadings. When a serious legal issue is presented, the tendency of the lawyers is . . . to reserve their objection until the trial. Consequently there is an increasing trend towards the abolition of the demurrer. The reform usually takes one of two courses, the substitution of the motion for judgment for the demurrer, as in New York, or the substitution of the objection in law, as in England. . . .

" . . . This substitution [of the motion for judgment for the demurrer] has been characterized as 'as ludicrous a piece of self-deception as the old fictions in ejectment.' But if the rules are liberally and flexibly applied, considerable gain may be achieved thereby. If fine distinctions are not drawn among the various kinds of motions, but a general motion is held to raise a variety of objections, it should result in doing away with the possibility of another stage of argument and decision before trial, and the delay consequent thereon, and also with the necessity of drawing a fine and unworkable distinction between demurrers and motions to expunge. Further, the practice as to motions and the decision of the court thereon should be more flexible than on the old demurrer, about which more technical rulings had

¹ See 10 N. Y. Judicial Council Ann. Rep., 318-319 (1944).

clustered. The court might well use the motion to shape the pleadings as it thought most desirable, without being limited to the decisions of either demurrer sustained or demurrer overruled.

"Unfortunately the reform was not applied in this spirit in New York; but the courts developed a hierarchy of different motions, each of which was required to follow its own separate groove. In some respects this tended to a practice more complicated, and with more opportunities for shadowboxing over mere allegations, than the old; and while reform has already been found necessary, it has not as yet reached the evil of the separate motions.

"The English objection in law seems therefore preferable. Under this practice the pleader may file an objection in law to the previous pleading *along with* his answer on the facts, but the court is to consider it in advance of trial only where the judge feels that a decision thereon will substantially dispose of the entire case.¹ This affords an opportunity to restrict the objection in law, or demurrer, to its primary object, and prevent its use for dilatory purposes. Concerning the form of pleadings, the motion is to be used exclusively, and, if no motion is made, objections of this kind are waived. Here, too, there would be a possibility of delay, unless such motions were, as they should be, summarily and perhaps somewhat arbitrarily disposed of. This result also is achieved under the English practice, where all such matters are not permitted to waste the time of the court, but are expeditiously disposed of by the King's Bench Masters."

RULES OF SUPREME COURT OF NEW JERSEY

40. Demurrers Are Abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just.

41. Objections to Pleadings Other Than Those Provided for in Rule 40 Above, Shall Be Made by Motion. The action of the court thereon is appealable after final judgment.

42. Objections to Pleadings. Every motion addressed to a pleading must present every cause of objection then existing.

¹ Cf. Clark, *op cit.*, at 502-503: "Since the decision on a demurrer rarely settles a case, but leads only to amended pleadings, it is questionable whether the court should be compelled to delay the case to hear the question raised by the demurrer in advance of the trial."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 7. Pleadings Allowed; Form of Motions. . . .

(c) DEMURRERS, PLEAS, ETC., ABOLISHED. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.¹ A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.² If, on a motion asserting the defense numbered (6) . . . , matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,³ and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

¹ Cf. *Kascoutas v. Federal Life Insurance Co.*, 193 Iowa 343, 185 N.W. 125, 22 A.L.R. 294 (1921); *Lorenzen v. Berg*, 234 Iowa 577, 13 N.W.2d 321 (1944).

² Cf. *Iowa R. Civ. P.*, 104.

³ For this rule, see *infra* p. 571.

SECTION 2. RULES REGULATING THE USE OF DEVICES FOR INTERPOSING DEFENSES IN POINT OF SUBSTANTIVE LAW

Rule I. A demurrer may not be based on any other grounds than those specified by statute or rule as grounds of demurrer.

SMITH v. SUMMERFELD

Supreme Court of North Carolina, 1891. 108 N.C. 284, 12 S.E. 997.

[Defendants demurred to the complaint on the grounds, among others, that it set forth evidence and that it was argumentative.]

SHEPHERD, J.: . . . The third and fourth grounds of demurrer are untenable. A demurrer does not lie except in the cases specifically mentioned in section 239 of *The Code*. *Dunn v. Barnes*, 73 N. C. 273. Redundancy and impertinence in pleading must be objected to by way of motion before answer or demurrer (*Best v. Clyde*, 86 N. C. 4), and the same is true as to argumentativeness, "indefiniteness or uncertainty, unless the uncertainty be such as to state no cause of action." Boone Code Pl. 54, 146.

Upon the whole complaint, we think there are facts constituting a cause of action.

Affirmed.

Rule II. A demurrer must distinctly specify the grounds upon which it is based, or it will be disregarded.

NOTE ON THE REQUIRED SPECIFICITY OF THE CODE DEMURRER

N. C. Gen. Stat. Ann. § 1-128 (1943) is typical of the code provisions in this regard. It provides: "The demurrer must distinctly specify the grounds of the objection to the complaint, or it may be disregarded."¹

Of the cognate Indiana statute, the Supreme Court of Indiana has said² that its purpose was to provide "a remedy for a

¹ For variants, see Miss. Code Ann. § 1490 (1942); Fla. Stat. § 50.26 (1941); Ind. Stat. Ann. § 2-1007 (Burn's 1933, 1946 Replacement); Tex. R. Civ. P., 90-91 (136 Tex. 471); N. Y. Civ. Prac. Act § 280. See also *Keltner v. Patton*, 204 Ind. 550, 185 N.E. 170 (1933); *Kelly v. Wright*, 144 Tex. 112, 188 S.W.2d 982 (1945); *Newport Savings Bank v. Manley*, 114 Vt. 347, 45 A.2d 199 (1946); *Weiner v. Lowenstein*, 314 Mass. 642, 51 N.E.2d 241 (1943).

² In *Hedikin Land & Improvement Co. v. Campbell*, 184 Ind. 643, 645-646, 112 N.E. 97 (1916).

serious evil of long standing. Theretofore, through the medium of general demurrers for insufficiency of facts, questions were actually presented here for the first time on the sufficiency of pleadings, and judgments were regularly reversed because of some technical defect in a pleading, which, if pointed out in the court below, would have been promptly corrected by amendment. Under such procedure counsel could, and often did, deliberately conceal from the trial court the real defect in the pleading on which they expected to rely in the appellate tribunal, by suggesting other and trivial objections. The result of such practice was the frequent granting of new trials, with the attendant evils of increased expense and long delay in the final hearing of just causes, and burdening the taxpayers of the State with the expense of two trials instead of one." And of the cognate Florida statute, the Supreme Court of Florida has said³ that its purpose is to provide the pleader with the information which he needs to enable him either to amend his pleading or to prepare himself to sustain it upon the argument of the demurrer.

It would seem that these purposes are not well served if the demurrant is required to do no more than to state the ground or grounds of his demurrer in the language of the statute. And yet, as Clark points out,⁴ some of the codes, for example, the New York Civil Practice Act, provide that certain of the grounds of demurrer,—lack of jurisdiction, another action pending, and failure to state a cause of action,—may be so stated.⁵ Clark also says: "In default of such a statute a conflict exists as to whether a demurrer stating simply that 'the complaint does not state facts sufficient to constitute a cause of action' is sufficient."⁶ As we shall see, that defect in a complaint is not waived by failure to demur. Clark is therefore of the opinion that where a demurrer is based upon that ground, little is gained by insisting upon more detail. Do you agree with him? Clark might have added that in some, at least, of the jurisdictions in

³ In *Benedict Pineapple Co. v. Atlantic C. L. R. R.*, 55 Fla. 514, 46 So. 732, 20 L.R.A., N.S., 92 (1908). Cf. *State v. Trustees*, 47 Fla. 302, 306, 35 So. 986 (1904): "When the substantial matters are thus stated, the parties come before the court with clear conceptions of their respective rights and duties and there can be no room for the contention that the party who has to meet the demurrer has been misled because of want of definiteness and certainty in the demurrer."

⁴ Clark, *Code Pleading*, 507 (2d ed. 1947).

⁵ The effect of N. Y. Civ. Prac. Act, § 278 (*supra* p. 371) and § 280, taken together, is that the only objections to a complaint which must "point out specifically the particular defect relied upon," are the objections that the plaintiff has not legal capacity to sue, that there is a misjoinder of parties plaintiff, and that there is a defect of parties, plaintiff or defendant. But cf. N. Y. County Sup. Ct. Rules, Special Terms, Rule III (12): "Upon all motions directed to pleadings, under such of the rules (102 to 114, inclusive) as do not permit affidavits in support of the motions, the moving party shall serve upon the opposition, at least two days before the return day of the motion, a brief in support of such motion or a memorandum setting forth the points upon which the moving party relies."

⁶ Clark, *op cit. supra*, at 508.

which more detail is insisted upon, a demurrer will not necessarily be disregarded if it fails to supply it. In Florida, for example, it will be disregarded only if a cursory examination of the declaration does not reveal that it is insufficient in law. If a "bare inspection," of the declaration does not disclose its insufficiency, then the trial judge should not sustain the defective demurrer and the Supreme Court will reverse a judgment for the demurrant, if he does. But if a hasty reading of the declaration is enough to determine its insufficiency, the trial court should sustain even a defective demurrer, and he commits reversible error if he does not.⁷ And, of course, although a demurrer is overruled, the demurrant may, as we shall see, continue to interpose the defense that the complaint is insufficient in law.

In *Ritter v. Albuquerque Gas & Electric Co.*, 47 N. M. 329, 142 P. 2d 919, 153 A. L. R. 273 (1943), the defendant moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, and the trial court granted the motion. N. M. Comp. Laws § 105-412 (1929) was the typical code provision that a demurrer to a pleading may be disregarded unless it distinctly specifies the grounds of the objection to the pleading. Relying upon this provision, Ritter contended upon his appeal from a judgment for the Gas Company that the court erred in granting the motion because it "did not advise plaintiff of the points, questions, or principles of law upon which the defendant relies to support its motion." But in 1942 the New Mexico Code was superseded by Rules of Civil Procedure patterned upon the Federal Rules. N. M. R. Civ. P., 12(b) 6 is identical with Fed. R. Civ. P., 12(b) 6 (*supra* p. 374); and N. M. R., 7(b), like Fed. R., 7(b), requires that an application to a court for an order "shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The New Mexico Rules, therefore, like the Federal Rules, require a motion to dismiss to state the grounds therefor with particularity. The Supreme Court nevertheless held that the trial court did not for that reason err in granting the motion. The Court pointed out that if the plaintiff desired greater particularity of statement in order to enable him to prepare for the argument of the motion, he might have and

⁷ See *Benedict Pineapple Co. v. Atlantic C. L. R. R.*, *supra* note 3; *Florida, C. & P. R. R. v. Ashmore*, 43 Fla. 272, 281, 32 So. 832 (1901); *The Mortimer Co. v. Fridstein*, 101 Fla. 33, 35, 133 So. 566 (1931). Cf. *Miss. Code Ann. § 1490* (1942): "When a demurrer shall be interposed, the court shall not regard any defect or imperfection in the pleadings, except such as shall be assigned for causes of demurrer, unless something so essential to the action or defense be omitted that judgment according to law and the right of the cause cannot be given."

should have moved therefor under N. M. R., 12(e), which is identical with Fed. R., 12(e) (*supra* p. 253, note 2).

You should consider whether procedural ends are better served by the typical code provisions or by the Federal and similar Rules, as applied in the *Ritter* case.

Rule III. A demurrer admits all material propositions which are alleged in the pleading to which it is addressed in the manner required by the rules of pleading, except those which the court may judicially notice to be false.

NOTE ON THE DEMURRER AS AN ADMISSION

The traditional formulation of this rule¹ is that a demurrer admits all such matters of fact as are sufficiently pleaded, except those that courts may judicially notice as false or impossible.² But it is not permissible to allege immaterial propositions or "conclusions of fact" or "conclusions of law";³ such matters of fact are not "sufficiently pleaded." However, as Martin put it,⁴ "the admissions of fact implied by a general demurrer are only for the purpose of the argument of the demurrer, and do not constitute evidence in the trial of any issue in the same or in any other case."⁵ Consequently, you should ask yourself whether this Rule means anything more than that in determining the rule of substantive law which is implicit in the allegations of a pleading which is demurred to as insufficient in law, the courts must ignore those allegations which, as it is said, a demurrer does not "admit."

Rule IV. A demurrer searches the record for defects of substance.

¹ See, e.g., Martin, Civil Procedure at Common Law, 198 (1905).

² Cf. *Cohen v. United States*, 129 F.2d 733, 736 (C.C.A. 3d 1942): "As already observed, this case was presented to the trial court upon a motion to dismiss because of the alleged failure of the complaint to state a claim upon which relief could be granted. Rule 12(b), Rules of Civil Procedure, 28 U.S.C.A. following section 723c. This motion supplanted the general demurrer in an action at law and admits, for the purpose of the motion, all facts which are well pleaded. . . . While the court must accept as true all well pleaded facts, the motion does not admit facts which the court will take judicial notice are not true, nor does the rule apply to legally impossible facts, nor to facts inadmissible in evidence, nor to facts which appear by a record or document included in the pleadings to be unfounded."

³ See *Sharp v. Cox*, *supra* p. 213; *Shake v. Board of Comm'rs*, *supra* p. 220; *People v. McCloskey*, *supra* p. 247.

⁴ *Op. cit. supra*, at 199.

⁵ Cf. Note, 14 A.L.R. 22, 87 (1921): "In view of the nature of a demurrer, admitting, as it does, not the absolute truth of the facts in the pleading demurred to, but merely their truth for the purposes of the consideration of the sufficiency of the pleading, it seems strange that anyone should try to make use, in a later action, of a demurrer as evidence against the person demurring of the facts admitted. The cases in which the attempt was made arose something like a century ago, and were unequivocally decided by the courts in keeping with the general rules underlying the subject of demurrer. To contend for the admissibility in evidence of facts admitted in a demurrer is to display a lack of all understanding of even the elements of pleading."

*NOTE ON THE DEMURRER AS SEARCHER
OF THE RECORD*

Let us suppose that the pleadings in an action consist of the complaint, an answer which contains only an affirmative defense, and a reply to the answer, and that the defendant demurs to the reply as insufficient in law. This rule means that the court is now authorized to and will consider the sufficiency in law of, first, the complaint, and if it is sufficient in law, second, the answer, and, if it is sufficient in law, then, the reply, even though no demurrers were interposed to the complaint and answer or, if they were, they were overruled.¹ It means also that the court will sustain the demurrer to the reply, although it is itself sufficient in law, if the complaint is insufficient, and will overrule the demurrer, although the reply is insufficient in law, if the complaint is sufficient but the answer is not. As Clark reminds us, the ground of the rule is said to be that a "bad plea" is sufficient for a "bad declaration," and the rule has the desirable result of raising these important issues promptly and in advance of trial.²

The demurrer so operates under the codes even in jurisdictions in which a demurrer is required distinctly to specify the grounds on which it is based.³ But, as Clark notes disapprovingly, some courts have refused to apply the rule in cases in which a plaintiff demurs to an affirmative defense in an answer which also contains negative defenses, on the ground that its application in that situation would be inconsistent with the rule that a defendant may not at the same time demur to and answer the complaint.⁴

Rule V. A substantive inadequacy in a pleading may be supplied by the allegations in a subsequent pleading.

BRUCH v. BENEDICT

Supreme Court of Wyoming, 1946. — Wyo. —, 165 P.2d 561.

Action to quiet title to a tract of land by Pauline R. Bruch against Emma Benedict, Louie R. Benedict and others. Louie

¹ See *Hanley v. Gables Trust Co.*, 141 Fla. 746, 3 So.2d 725 (1941); *Coates v. Eastern Farmers Exchange*, 99 Vt. 170, 130 A. 709 (1925). Cf. *Gerstel v. William Curry's Sons Co.*, 155 Fla. 471, 20 So.2d 802 (1945): "[I]t is a well recognized rule of pleading that on demurrer the court will consider the whole record and give judgment against the party chargeable with the earliest substantial fault in pleading, notwithstanding the particular pleading demurred to may likewise be defective."

² Clark, *Code Pleading*, 525 (2d ed. 1947).

³ See *Coates v. Eastern Farmers Exchange*, *supra* note 1; Clark, *op. cit.*, at 525-526.

⁴ *Ibid.*

R. Benedict filed a cross-petition. From the judgment, Louie R. Benedict appeals.

BLUME, CHIEF JUSTICE. This is an action, brought by Pauline R. Bruch to quiet title to the Southwest Quarter of Section 12, and the West Half of the West Half of Section 13, Township 33 North, Range 69 West of the Sixth P. M., in Converse County, Wyoming. The action was commenced on July 22, 1944; none of the many parties appeared in the action except Louie R. Benedict. The Court entered judgment for the plaintiff, quieting title to the foregoing land in her. From that judgment the defendant, Louie R. Benedict, has appealed. He will ordinarily be referred to herein as the defendant, and the plaintiff as plaintiff.

The petition, among other things, alleged that "plaintiff is the owner and she and her immediate predecessors in title have been in the actual, open, notorious and exclusive and continuous possession for more than ten years prior to the commencement of this action" of the lands above described. The defendant answered, admitting some of the allegations and denying others. In Paragraph III he stated that "the plaintiff herein unlawfully keeps this answering defendant out of possession of said property and denies the right of this answering defendant in said real property". The defendant filed a cross-petition claiming title to the property and the right to the immediate possession thereof. Plaintiff in reply alleged, among other things, that she and her predecessors in interest to said land had been in possession thereof ever since July 11, 1928. . . .

It is contended by counsel for defendant that the petition does not state a cause of action, in that it fails to allege that the plaintiff was in possession of the premises in controversy at the time of the commencement of the action. The point was not raised in the Court below, but counsel rely on the fact that if the petition fails to state a cause of action, it may be raised for the first time in this Court under § 89-1008, Rev. Statutes 1931. The petition states that the plaintiff and her predecessors "have been" in continuous possession for ten years prior to the commencement of the action. The expression is in the past tense, and yet giving the pleading a liberal construction as we must, it is probable that we should construe it as referring to the time immediately preceding, and as including the time of the commencement of the action. If that is not correct, then we think the defect was supplied by the answer in which the defendant states in Paragraph III thereof, that the plaintiff keeps the defendant out of the possession of the property. This can mean nothing else than that plaintiff was then in possession of the

premises. That the petition may be aided by the answer has previously been held by this Court.¹ *Sowers v. King*, 32 Wyo. 167, 231 P. 411, 238 P. 540; *Church v. Blakesley*, 39 Wyo. 434, 273 P. 541. Furthermore, plaintiff in her reply states that plaintiff and her predecessors have been in continuous possession ever since July 11, 1928. Many cases hold that a defect in the petition may be cured by an allegation in the reply, 49 C. J. 863. Again, it is said in 51 C. J. 187, 188: "The objection that plaintiff in a suit to quiet title is not in possession may be waived. Such waiver results where the objection is not taken by demurrer, plea or answer, or where, after demurrer on this ground is overruled, defendant answers on the merits. Defendant likewise waives the objection where he asks for affirmative relief, or stipulates for the trial of the cause before a master." Taking all the facts into consideration, we think that the contention here made should be overruled. . . .

. . . Finding no reversible error in the record, we should, accordingly, affirm the judgment of the Trial Court, and it is so ordered.²

Rule VI. A demurrer may not allege propositions about matters of fact.

HALLORAN v. HACKMANN

Supreme Court of Missouri, 1942. 160 S.W.2d 769.

HYDE, COMMISSIONER. Plaintiff seeks review, by writ of error, of a judgment of dismissal of plaintiff's action for \$75,000 for services rendered. This judgment was entered after the court had sustained defendant's motion asking "that plaintiff's petition be stricken from the files and this cause dismissed."

Plaintiff's petition alleged: "That on, to wit, the 2nd day of December, 1935, plaintiff instituted an action against defendant in the Circuit Court of the City of St. Louis to recover for the services hereinafter alleged, and that said suit was instituted within five years after the last services herein alleged were performed by plaintiff for defendant, and that thereafter, to wit, on the 24th day of October, 1938, plaintiff therein suffered a nonsuit in said cause, and that plaintiff files this cause within one year after said nonsuit was suffered." The petition then stated the following facts: That defendant was fearful that

¹ Cf. *Geros v. Harries*, 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 (1925).

² Cf. Clark, *Code Pleading*, 735-736 (2d ed. 1947): "A serious conflict has arisen, however, where the defendant refers to the fact only to deny it. New York and some other jurisdictions have asserted *logically* that a *denial* cannot supply the defect. Other jurisdictions, looking less to logic than whether or not the issue has been fairly raised, have wisely held that a pleading may be aided by such a denial."

Joseph McBride would contest the will of Thomas Halpin; that Joseph McBride intended to contest said will; that defendant employed plaintiff to endeavor to induce Joseph McBride not to contest the will; that plaintiff did induce Joseph McBride to refrain from doing so; and that "said services were performed by him beginning on or about the 12th day of January, 1930, continuously until subsequent to the 3rd day of December, 1930, . . . under one continuous, open running account between plaintiff and defendant."

Defendant's motion to dismiss stated that the court was without jurisdiction, upon three grounds as follows: (1) That the new suit did not state the same cause of action as the former suit in which plaintiff suffered a nonsuit. (2) That the petition in the new suit constituted a departure from the petition in the case in which plaintiff suffered a nonsuit. (3) That the new action was a new and different cause of action from the former suit, and that this action shows on its face that it is barred by the 5-year statute of limitations. . . .

Defendant's theory is that the part of the motion to dismiss seeking to strike plaintiff's petition was proper because a motion to strike is a proper way to raise the question of departure. See *Reinker v. Wesche*, Mo. Sup., 117 S. W. 2d 334, and cases cited; 1 Houts, *Missouri Pleading and Practice Annotated*, p. 266, § 127, also § 161. However, a departure is a change of the cause of action by a subsequent pleading in the same lawsuit. See 1 Houts, *Missouri Pleading and Practice Annotated*, p. 331, § 160. In that situation, when the subsequent pleading is stricken, there is no final disposition of the lawsuit, but it still remains pending on the cause of action stated in any prior petition. The petition sought to be stricken here is not an amended petition continuing first lawsuit; that suit is ended. This petition is the first petition in a new action. The question actually sought to be presented is not departure, but the bar to the new action of the statute of limitations. One section of our articles on limitations (sec. 1026, R. S. 1939; sec. 874, Mo. St. Ann. p. 1161) grants an extension, of one year after nonsuit, to commence a new action on the same cause of action as was stated in the case in which the nonsuit was suffered. Nevertheless, the filing of a petition stating the same cause of action again is not a continuation of the former suit, but is the commencement of an entirely new suit, and, because of this saving statute, it is still within the limitations period. Therefore, if a new petition (although alleging a nonsuit of the same action as here) actually states a different cause of action, then Section 1026 is inapplicable to save it, and a different section of the statute of limitations does apply; in

this case the five-year statute. Sec. 1014, R. S. 1939, sec. 862, Mo. St. Ann. p. 1143. To determine this, the same tests will be applied as are used "in determining whether a pleading is an amendment or a departure." *St. Charles Savings Bank v. Thompson*, 284 Mo. 72, 223 S. W. 734, loc. cit. 737. However, when the necessary facts (to constitute the bar of limitations) do not appear on the face of the petition, in the new action, then this is a matter for proof and it is a defense that must be raised by answer.

What we have here is a pleading which seeks to dispose of the whole case by judgment of dismissal. It seeks to do this on the ground that the action is barred by the five-year statute of limitations. It is in effect a demurrer, and must be treated as such, since this ground could be reached by demurrer if the facts appeared on the face of the petition. *Ludwig v. Scott*, Mo. Sup., 65 S. W. 2d 1034, and cases cited. Since the necessary facts (for ruling this question) do not appear on the face of the petition, it cannot be reached by demurrer under our present practice because we have no provision for a speaking demurrer¹ (one that must be supported by evidence); and this ground is, under these circumstances, a defense which must be raised by answer. *Pacific Line Gypsum Co. v. Missouri Bridge & Iron Co.*, 286 Mo. 112, 226 S. W. 853; *Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104; 1 *Houts*, *Missouri Pleading & Practice Annotated*, p. 146, § 100; see also *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. 2d 826, loc. cit. 832 (10-11). In this kind of a situation, a speaking demurrer might well be an aid to prompt an efficient administration of justice, resulting in avoidance of expense and delay, by making it possible to decide at once an issue that would dispose of a lawsuit, actually barred or groundless on uncontroverted facts; and our new proposed code provides for such a procedural improvement. (Proposed General Code of Civil Procedure, Plan II, as recommended by the Advisory Committee appointed by the Supreme Court of Missouri. Section 30, Art. 6; see *Missouri Practice Compared with the Federal Rules and Proposed New Code—Wheaton*, 13 Mo. Bar Journal 9; see also *Parties and Pleadings in the Missouri Proposed Code of Civil Procedure—Atkinson*, 7 Mo. Law Review 37.) However, this provision of the proposed code cannot be put in operation unless such changes are adopted. While a motion to dismiss could, if sufficient for such purpose, be considered and treated

¹ Cf. *In Re Estate of Ferris*, 234 Iowa 960, 14 N.W.2d 889 (1944): "When a demurrer states as a fact that which does not appear on the face of the pleading questioned, it is what Lord Hardwicke, in *Brownsword v. Edwards*, 2 Ves. Sr. 243, 245, termed a *speaking demurrer*, which is the office of a plea and not of a demurrer."

as an answer, we hold that cannot be done here because dismissal is sought on the basis of what is shown by the pleadings so that this motion was clearly not intended as an answer. Defendant also contends that the first action (in which nonsuit was suffered) was not brought within the five-year limitations period. In that case, the one-year saving statute could not apply; but that likewise is an affirmative defense which must be made by answer and supported by proof. (It seems reasonable to believe that this was the actual basis of the court's ruling.) We further hold that this petition does not show on its face it is barred by the statute of limitations.

The judgment is reversed and the cause remanded.

BRADLEY and DALTON, CC., concur.

PER CURIAM. The foregoing opinion by HYDE, C., is adopted as the opinion of the court.

All concur.²

MISSOURI REVISED STATUTES ANNOTATED (CUM. SUPP. 1946)

§ 847.61 Objections Which May be Raised by Motion

The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause:

- (1) lack of jurisdiction over the subject matter;
- (2) lack of jurisdiction over the person;
- (3) improper venue;
- (4) insufficiency of process;
- (5) insufficiency of service of process;
- (6) that plaintiff should furnish security for costs;
- (7) that plaintiff has not legal capacity to sue;
- (8) that there is another action pending between the same parties for the same cause in this state;
- (9) that several claims have been improperly united;
- (10) that the counterclaim or cross-claim is one which cannot be properly interposed in the action.

The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit in accordance with sub-section (d) of section 6.

² See Note, 137 A.L.R. 483 (1942).

NEW YORK RULES OF CIVIL PRACTICE

Rule 107. Motion for Judgment on the Complaint and Affidavit.¹ After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and an affidavit stating facts tending to show:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties for the same cause.

5. That there is an existing final judgment or decree of a court of competent jurisdiction rendered on the merits, determining the same cause of action between the parties.

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.

7. That the claim or demand set forth in the complaint has been released.

8. That the contract on which the cause of action is founded is unenforceable under the provisions of the statute of frauds.

9. That the cause of action did not accrue against the defendant because of his infancy or other disability.

A motion specifying an objection set forth in subdivisions 5, 6, 7, 8 or 9 may be made under this rule whether or not the defect appears on the face of the complaint.²

A notice of motion specifying an objection set forth in subdivisions 1, 3, 4, 5, 6, 7, 8 or 9 hereof shall be served within twenty days after the service of the complaint. A notice of motion specifying an objection set forth in subdivision 2 hereof may be served at any time prior to trial.

Rule 108. Determination of the Motion. If the plaintiff on the hearing of a motion specified in rule one hundred and seven shall present affidavits denying the facts alleged by the defendant or shall state facts tending to obviate the objection, the court may hear and determine the same and grant the motion, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just; or it may direct that the questions of fact,

¹ Cf. Rule 106, *supra* p. 371.

² See 10 N. Y. Judicial Council Ann. Rep., 321-322 (1944).

which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of which shall be reported to the court for its action; or it may overrule the objections, and in its discretion may allow the same facts to be alleged in the answer as a defense. If the objections be made to some of the causes of action, and not to all, judgment may be entered as provided in section ninety-six of the civil practice act or rule one hundred and ninety-five of the rules of civil practice.

NOTE

Clark, Code Pleading, 503 (2d ed. 1947): "Somewhat the opposite tendency [that is, opposite to the tendency toward the abolition of the demurrer and of postponing until the trial the decision of questions regarding the sufficiency of pleadings], but nevertheless one highly desirable for its effectiveness, is the modern summary procedure for disposing of issues of fact on the merits without trial. This procedure came into New York practice in 1921 by rules copied from the English practice. . . . The practice has been constantly extended until in the most modern system, represented by the Federal Rules, either party may raise issues of fact or law by such motion, and secure judgment if the affidavits of the parties substantially agree upon or settle the controlling facts and the correct judgment is then apparent."

MILLER v. NATIONAL CITY BANK OF NEW YORK

[For the opinion in this case, see *infra* p. 723.]

BENSON v. EXPORT EQUIPMENT CORPORATION

Supreme Court of New Mexico, 1945. 49 N.M. 356, 164 P.2d 380.

Common-law action by Ted M. Benson, Jr., and Ted M. Benson, Sr., to recover damages for personal injuries allegedly sustained by the minor through the negligence of defendant employer, and for loss of services and medical expenses incurred. From a judgment dismissing the complaint, plaintiffs appeal.

MABRY, CHIEF JUSTICE. Appellants sued to recover damages in common law for personal injuries allegedly sustained by the minor, Ted M. Benson, Jr., through the negligence of appellee, the employer. The complaint undertook to set forth two causes of action—the first on behalf of the minor himself for personal injuries allegedly sustained, and the second on behalf of the minor's parent to recover damages for loss of services and for medical expenses incurred during his minority. Before answering, appellee moved for dismissal of the complaint upon the following ground, among others: "That the complaint affirmatively shows that it does not state a cause of action for common law damages for negligence as alleged therein, and discloses

that the injuries of which plaintiff complained were suffered by accident arising out of and in the course of his employment and are, therefore, compensable under the Workmen's Compensation Act of the State of New Mexico."

And, as to the second cause of action, asserted by the minor's father, the motion for dismissal was based primarily upon the following ground: "That any action that the plaintiff Ted M. Benson, Sr., might have had at common law to recover damages for the loss of the services of his minor child, Ted M. Benson, Jr., have been abrogated by reason of the Workmen's Compensation Act of New Mexico and will be compensated for by disability payments provided for and paid under the provisions of said Act."

An additional question presented goes to the merits of the case. This is whether, under the circumstances of this case, the minor's employment, at the time of his injury, came within the terms of the New Mexico Workmen's Compensation Act, in which event the common law remedy would not apply. We will first consider the question involving the Rules of Procedure. Facts not appearing upon the face of the complaint itself were injected by the motion to dismiss; and but for the notice given such additional admitted facts, the pleadings would not have been ripe for a decision upon the questions of law.

Appellant complains that the trial court erred in entertaining the motion to dismiss prior to requiring appellee to answer on the merits.

This appeal calls for an interpretation of certain of our new rules of civil procedure, and presents a case of first impression in this jurisdiction.

Rule 19-101, (12) (b),¹ identical to Federal Court Rule 12 (b), 28 U.S.C.A. following section 723c, reads as follows: (See Fed. R. 12 (b) *supra* p. 374.)

¹ N. M. Rule 12(b) was identical with Federal Rule 12(b) before the latter was recently amended by adding the seventh defense which it permits to be interposed by motion and the last sentence which requires the motion to be treated as a motion for summary judgment if "matters outside the pleading are presented to and not excluded by the court." Of this latter amendment the Advisory Committee said [Federal Rules of Civil Procedure 29, 31 (West Publishing Co. rev. ed. 1947)]: "Rule 12(b) (6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the

Rule 19-101 (7) (c) provides: "Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used."

Appellee argues that the trial court was correct in sustaining its motion to dismiss since under the rules a defense *in law or fact* may be raised by motion, as in this case was done, where a defense is that the complaint fails to "state a claim upon which relief can be granted." And, that such motion, unlike the conventional demurrer, may properly present facts not appearing upon the face of the complaint itself which, if true, are to be considered in determining the merits of the motion. Appellant contends that the language in the rule permits no such construction and that such matters of fact relied upon in defense by appellee, as herein shown, should be set up in the answer. There is authority for the position taken by able counsel for each of the parties hereto,² but in our opinion the better and more recent authority upon the point supports the view held by the trial court.

The prime purpose of the new rules is to eliminate delays resulting from reliance upon pure technicalities and generally to streamline and simplify procedure so that the merits of the case might be reached and the issues determined without lengthy or costly preparation for a trial on the merits, which trial might never be necessary, and without the many irritating delays which accompanied the old practice.

We know that under Rule 16 (1941 Comp. Sec. 19-101 (16)) a procedure is provided for a pre-trial conference for the simplification of the issues to be tried.³ This is accomplished through obtaining admissions of fact and documents which can be agreed upon, or which would not be relied upon at trial, and for the clarification of other questions looking toward a prompt and clear approach to the controverted issues. It is not reasonable to assume that the rule making power, having so fully provided for the simplification of issues at a pre-trial conference, would not wish to extend the same remedy to a litigant who, by motion,

sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. . . . The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b) (6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b) (6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion."

² See *supra* note 1.

³ For the provisions of Fed. R. Civ. P., 16 see *infra* p. 540.

and before answer upon the merits and preparation for trial, could have the court determine as a matter of law whether, in the light of additional facts which will not, or cannot, be disputed, although appearing for the first time in the motion, a cause of action be stated by the complaint.

The argument of appellants to the effect that such an interpretation as was adopted by the trial court and which we propose to accept would, in effect, deny litigants the right to trial by jury in many cases, does not appeal to us. Appellee does not contend that any issuable fact could be so determined, but it is only the facts raised by the motion which must stand as admitted, although not appearing in the complaint, that the motion would apply.

"Disputed questions of fact involved in the merits of claim or defense" are not involved. *Gallup v. Caldwell*, 3 Cir., 120 F. 2d 90, 93. These must be determined as such facts are ordinarily determined, by the court, or jury.⁴ But we have no such factual situation here. All facts here involved which become material to a determination of the questions of law are undisputed.

Counsel for appellants, at the hearing upon the motion here challenged as containing matters which should have been raised by answer, and when the trial court advised appellants that further time would be given them, if needed, to prepare to meet the matters of fact raised by the motion, said: "We are ready to go ahead. I don't think there is anything set forth in the motion that we are inclined to contest, except with respect to the statement that the boy's age was given on the paper delivered to the employer, from the United States Social Security Commission, or otherwise; or the age as stated by the boy and his father, we are not prepared to admit; but everything else contained in the motion we will admit." The court responded: "That simplifies the issues, as far as the facts are concerned."

So, as the matter now stands, accepting as correct the age of the minor relied upon by appellants themselves, which, for

⁴ Of the practice of moving under Federal Rule 12(b) (6) on both the complaint and affidavits, the Advisory Committee has said (*op. cit.* note 1 *supra*, at 29-30): "It has . . . been suggested that this practice could be justified on the ground that the federal rules permit 'speaking' motions. . . . The term 'speaking motion' is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion. . . . [That rule] does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain."

the purposes of this case we do as hereinafter to be noticed, no controverted fact remains to be disposed of. . . .

"It is not important", under the federal court holdings, "whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion. Federal Rules 6 (d), 12 (b), 43 (e), 56 (e), 28 U. S. C. A. following section 723 c." *Central Mexico Light & Power Co. v. Munch*, 2 Cir., 116 F.2d 85, 87; *Gallup v. Caldwell*, 3 Cir., 120 F.2d 90; *Victory v. Manning*, 3 Cir., 128 F.2d 415.

To quote from *Gallup v. Caldwell*,⁵ supra:

"We are met at the outset by the question whether it was proper for the court below to make a preliminary investigation, which carried it outside of the pleadings, as to the plaintiff's stock ownership. . . . The problem which, restated, is whether the Federal Rules of Civil Procedure countenance a 'speaking' motion to dismiss, has been much discussed since the adoption of the Rules. Each side of the question has drawn to it distinguished proponents. Their arguments and reasons are collected in a note in 9 Geo. Wash. L. Rev. 174 (Dec. 1940). We think that such procedure should be permitted especially in the kind of situation here presented. See 1 Moore's Federal Practice 645. Despite plaintiff's allegation of stock ownership it is clear that she was not a stockholder whose ownership was registered on the books of the corporation at the time suit was instituted. If record ownership is a prerequisite to the right to bring this action, then it is expedient that the point be decided preliminarily. The alternative would be to sanction discovery and perhaps other pre-trial proceedings likely to be exceedingly burdensome upon both parties only to have the case ultimately dismissed at the trial because of plaintiff's inability to prove a fundamental but initial point. This would not only be a needless waste of the court's time but it would run counter to the mandate of Rule 1 that the Rules 'be construed to secure the just, speedy, and inexpensive determination of every action'.

"In so holding, we do not indicate that *disputed questions of fact involved in the merits or claim or defense* may necessarily be fought out as preliminary issues raised upon motions. The affidavits filed by the parties here raised no fact controversy, but a question of law. No problem arising out of a possible claim to jury trial is involved. The question of law thus raised is the next point for consideration." (Emphasis ours.) . . .

⁵ This decision is commented upon in 30 Calif. L. Rev. 92 (1941) and 15 So. Calif. L. Rev. 272 (1942).

Much of the authority cited by counsel for appellants in their able brief is inapplicable. Certainly the New Mexico decisions relied upon which were decided before our adoption of the new rules in 1942 are not in point. . . .

The motion raised questions which, taken together with the allegations of the complaint, established the following undisputed facts: (1) that the employee, Ted M. Benson, Jr., was at the time of his injury, sixteen years of age; (2) that he was employed by appellee, a foreign corporation authorized to do business generally in New Mexico; (3) that appellee had, on or before the date of the employment and injury, filed in the office of the clerk of the district court of Santa Fe County a good and sufficient undertaking as required of such foreign corporations operating under the New Mexico Workmen's Compensation Act (1941 Comp., Sec. 57-903); (4) that the injured workman did not at the time of entering the employment of appellee, or at any time, give notice in writing as provided by law (Sec. 57-904) electing not to become subject to the provisions of the compensation act; (5) that the employee had, subsequent to the date of the accident and injury, received certain monthly payments as compensation under the act and had permitted the appellee and the insurance carrier to assume and pay certain medical and hospital expenses resulting therefrom.

This undisputed factual situation presents, therefore, only questions of law.⁶ . . .

All questions raised are without merit. The judgment should be affirmed and it is so ordered.

Rule VII. All grounds of demurrer to a complaint, except lack of jurisdiction of the subject of the action and the failure to state a cause of action, are waived by the failure to interpose them by demurrer.

WATSON v. LEE COUNTY

Supreme Court of North Carolina, 1944. 224 N.C. 508, 31 S.E.2d 535.

DEVIN, JUSTICE. The appeal in this case brings up for our consideration questions relating to the sufficiency of the pleadings. The plaintiff demurred to the answer on the ground that the defenses sought to be interposed to his complaint were insufficient in law and in substance. The court below being of opinion the demurrer should be overruled so adjudged, and the plaintiff appealed. . . .

⁶ The court's discussion of these questions is omitted.

In this Court the defendants demurred to the complaint and moved to dismiss on the ground that it did not state facts sufficient to constitute a cause of action. In view of the antecedent proceedings in the cause, may this Court now consider the defendants' demurrer to the complaint on this ground? We think so. It is the rule prevailing in this jurisdiction that a demurrer on the ground that the complaint does not state a cause of action may be interposed at any time in either trial or appellate court. It was said in *Snipes v. Monds*, 190 N. C. 190, 129 S. E. 413: "Even after answering in the trial court, or in this court, a defendant may demur ore tenus, or the court may raise the question ex mero motu that the complaint does not state a cause of action." . . . In *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621, Clark, J., used this language: "The court here will look into the record, and if there is a want of jurisdiction, or a failure to state a cause of action, it will ex mero motu dismiss the action, for such defect cannot be waived."

The reason of the rule is that if the basis of the action, the statement of the cause of action in the complaint, is defective in substance and insufficient, the action itself must fail, and when this is brought to the attention of the Court it will so declare.

. . .

The demurrer to the complaint is sustained and the cause remanded to the Superior Court of Lee County where the plaintiff may have leave to amend as provided by statute, if so advised. G. S. §§ 1-131, 1-141; *Cody v. Hovey*, 216 N. C. 391, 5 S. E. 2d 165; *Cody v. Hovey*, 217 N. C. 407, 8 S. E. 2d 479.

Demurrer to complaint sustained.¹

NOTES

(1) Clark, *Code Pleading*, 533, 535 (2d ed., 1947): "[T]he two defects of substance, lack of jurisdiction of the court over the subject-matter and failure to state facts sufficient to constitute a cause of action, are not waived by failure to demur. Objection may be made at the trial as by objection to the evidence, motion for a nonsuit or for a directed verdict, or in arrest of judgment, and so on. In fact, unless there has been a verdict so that the defect has in some manner been supplied—as it could not be where the objection is lack of jurisdiction of the court—objection may be taken on appeal or the judgment itself may be a nullity."

"Since the pleader may reserve his attack on the plaintiff's legal theory until the trial, it becomes an important question of strategy whether to do so or not. Unless the demurrer will raise the only issues in the case, the tendency is to hold back the claims

¹ See N. C. Gen. Stat. Ann. § 1-134 (1942), *supra* p. 370; N. Y. Civ. Prac. Act, § 279, *supra* p. 371; *Huber v. Collins*, 50 N.E.2d 906 (Ohio App. 1942).

of law until the trial, and thus concentrate all one's strength at one time. In view of the fact that the demurrer so often does not dispose finally of the case, the modern view of those interested in pleading reform is to compel the postponement of all argument on these points until the trial, unless the court feels that the decision on the law may make a trial unnecessary."

(2) *Kern v. United Railways Company of St. Louis*, 214 Mo. App. 232, 237-238, 259 S. W. 821 (1924): "No demurrer to the petition was filed. The only demurrer offered was the demurrer *ore tenus* by objection to the introduction of testimony, on the ground that the petition stated no cause of action. Such a demurrer will not reach mere uncertainty or indefiniteness of averment. . . . Such a method of attack smacks of the ambuscade and of a digging of pitfalls for the unwary, and is unavailing, if by reasonable intendment, or by fair implication from the facts stated, or if by a most liberal construction, the essential allegations may be got at by inference. While the courts recognize the right of a defendant to attack the petition by objection to the introduction of testimony, yet such practice is only tolerated and, when substituted for a demurrer, the most liberal intendment is made in favor of the petition, and if a matter material to plaintiff's cause of action be not expressly averred, but the same be necessarily implied from what is expressly averred, the defect is cured by the verdict. The rule to go by in the disposition of such objection is the same bland rule applied to motions in arrest. . . . The fair way to challenge the sufficiency of a petition is by demurrer in the beginning, so that, if it is judged insufficient, and is susceptible of amendment the fault may be corrected. If a party lies in wait for his adversary the court should not allow him an advantage that he could not have attained in the open field."

LASKO v. MEIER

Supreme Court of Illinois, 1946. 394 Ill. 71, 67 N.E.2d 162.

THOMPSON, CHIEF JUSTICE. The plaintiff, Wallace Lasko, filed suit in the circuit court of Montgomery county against Ferd Meier and his son, Vern Meier, to recover damages for personal injuries. On plaintiff's motion, during the progress of the trial, the case was dismissed as to the defendant, Ferd Meier. The jury returned a verdict for \$8000 in favor of plaintiff and against the remaining defendant, Vern Meier. The trial court entered judgment on the verdict. The Appellate Court affirmed the judgment and the cause is now before this court for further review, upon leave granted.

It is first contended that the complaint charges a cause of action against Ferd Meier, only, and contains no statement of a cause of action against Vern Meier, the appellant; that although the complaint alleges that Ferd Meier, through his servant, Vern Meier, committed one or more acts of negligence, it

contains no charge of negligence against Vern Meier, the servant, or any allegation or charge that Vern Meier, the servant, was guilty of any act of negligence; and that the negligence alleged was the negligence only of the master, Ferd Meier. Appellee, in opposition, asserts that the complaint states sufficient facts to support the verdict and judgment and that, since no attack was made upon it in the trial court, any defects therein must be considered as cured by the verdict.

All intendments are in favor of the sufficiency of a complaint which is not questioned until after verdict. *Connett v. Winger*, 374 Ill. 531, 30 N. E. 2d 1. A verdict will cure not only all formal and purely technical defects and clerical errors in a complaint,¹ but will also cure any defect in failing to allege or in alleging defectively or imperfectly any substantial facts which are essential to a right of action, if the issue joined is such as necessarily requires, on the trial, proof of the facts so omitted or imperfectly stated and if such facts can be implied from the allegations of the complaint by fair and reasonable intendment.² 41 Am. Jur. 575, sec. 407; *Miller v. Kresge Co.*, 306 Ill. 104, 137 N. E. 385; *Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651; *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455. If the declaration or complaint omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the facts alleged on which issue is joined, a verdict for the plaintiff will not cure the omission. *Foster v. St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803. Where the declaration or complaint and the issue joined upon it do not fairly impose the duty on the plaintiff to prove the omitted fact, the omission will not be cured by verdict. *Chicago & Alton R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680. This court, in the case of *Bowman v. People*, 114 Ill. 474, 2 N. E. 484, 485, which was an action at law, quoted from Chitty, in his work on Pleading, as follows: "The expression '*cured by verdict*' signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was

¹ See, e. g., *Bjelde v. Dolan*, 248 Wis. 153, 21 N.W.2d 258 (1946); *Nicolai v. Drimble*, 29 Or. 76, 43 P. 865 (1896); *Greeve v. Patik Coal Co.*, 232 Iowa 803, 5 N.W.2d 185 (1942).

² See, e. g., *Gray v. Hammond Lumber Co.*, 113 Or. 570, 232 P. 637 (1925); *Lampan v. Lamping*, 70 Colo. 167, 199 P. 418 (1921); *Paden v. Chicago, R. I. & P. Ry. Co.*, 276 Ill. 62, 114 N.E. 540 (1916); *Kern v. United Railways Co. of St. Louis*, 214 Mo. App. 232, 259 S.W. 821 (1924); *Kemper v. Gluck*, 327 Mo. 733, 39 S.W.2d 330 (1931); *Collins v. School District No. 39*, 114 Minn. 307, 131 N.W. 322 (1911); *Harlow v. Supreme Lodge Knights of Honor*, 23 Ky. 456, 62 S.W. 1030 (1901); *Cannon v. Miller*, 22 Wash.2d 227, 155 P.2d 500 (1945).

given. On the one hand, the particular thing which is presumed to have been proved must always be such as can be implied *from the allegations in the record by fair and reasonable intendment*; and, on the other hand, a verdict for the party in whose favor such intendment is made is indispensably necessary." The rule is, as stated in the last-cited case, that if the declaration omits to allege any substantial fact which is essential to a right of action, and which is not *implied in or inferable from* the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. The question whether a complaint discloses a cause of action is always open to consideration in a court of review. There is a substantial and material difference between a complaint which alleges no cause of action and which may be questioned at any time and one which defectively or imperfectly alleges a cause of action and is good after verdict. *Owens-Illinois Glass Co. v. McKibbin*, 385 Ill. 245, 52 N. E. 2d 177. If, with all intendments in its favor, a complaint wholly and absolutely fails to state any cause of action at all, objection can be made to it for the first time on appeal. But, on the other hand, if the complaint states a cause of action, no matter how defectively or imperfectly alleged, and the same is not challenged below, then such defectively stated cause of action is cured by verdict and cannot be questioned on appeal.

Our inquiry, therefore, is not whether the complaint in this cause is skillfully drawn in compliance with the rules of good pleading or whether it contains a perfect statement of a cause of action against appellant, but whether it alleges, regardless of how imperfectly or defectively it may be stated, any cause of action whatever as to him. A cause of action consists of a right belonging to the plaintiff and some wrongful act or omission done by the defendant by which that right has been violated and a grievance suffered therefrom by the plaintiff for which the law gives him a right to sue. A cause of action includes every fact necessary for the plaintiff to prove to entitle him to succeed, and every fact which the defendant would have a right to traverse. *City of Elmhurst v. Kegerreis*, 392 Ill. 195, 64 N. E. 2d 450. The terms "right of action" and "cause of action" are equivalent expressions. *Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651.

It is necessary, in an action to recover damages for personal injuries, to allege and prove the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains, the failure of the defendant to perform that duty, and the resulting injury to the plaintiff. *Bremer v. Lake Erie & Western R. Co.*, 318 Ill. 11, 148 N. E. 862, 41 A. L. R. 1345; *Miller*

v. Kresge Co., 306 Ill. 104, 137 N. E. 385; McAndrews v. Chicago, Lake Shore & Eastern R. Co., 222 Ill. 232, 78 N. E. 603. The Civil Practice Act provides that all pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply. Ill. Rev. Stat. 1945, chap. 110, par. 157. It also provides that no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet. Ill. Rev. Stat. 1945, chap. 110, par. 166. We find that before the Civil Practice Act it was held that a declaration should contain a clear and distinct statement of the facts which constitute the cause of action so that they might be understood by the party who was to answer them and that the main purpose of a pleading was accomplished when, by reasonably intelligible allegations, the opposing party was advised of the case to be made against him. Miller v. Kresge Co., 306 Ill. 104, 137 N. E. 385. It was also held that all that was necessary in the statement of a plaintiff's claim in a declaration was a clear and concise statement, couched in simple language, of sufficient ultimate facts to show a liability on the part of the defendant to the plaintiff. Lincoln Park Coal & Brick Co. v. Wabash R. Co., 338 Ill. 82, 170 N. E. 8.

The complaint in the present case contains only one count. Its averments, in so far as pertinent to the question raised by appellant, are that the defendant, Ferd Meier, was the owner of and, through his agent, servant and son, Vern Meier, was possessed of and had control of a certain automobile; that the defendant, Ferd Meier, through his agent, son and servant, Vern Meier, then and there did one or more of the following acts: (a) carelessly and negligently drove and managed his automobile, etc.; or, (b) operated his said motor vehicle at a rate of speed in excess of that which was reasonable and proper, etc. Appellant contends that the complaint is fatally defective as to him because it contains only the statement that Ferd Meier, through his agent, son and servant, the appellant, committed one or more acts of negligence, and contains no statement that he, the appellant, committed any act of negligence. The complaint must state facts from which the law will raise the duty. It is not necessary to explicitly say of a defendant that he was guilty of negligence. It is sufficient if the facts stated are such that the law will attach to the conduct of the defendant the charge of negligence. The complaint in this case was filed against both Ferd Meier and appellant and prayed judgment against both of them. If the facts alleged disclose that appellant has committed some act, violating a duty owed to the plaintiff, and for

which violation the law has given plaintiff a remedy against him, then the complaint sufficiently states a cause of action against appellant. An averment that appellant was negligent would add nothing to the sufficiency of the complaint. If the facts stated disclose negligence on his part, the averment is surplusage; and if they do not, it is useless.

A master and servant are each liable for injuries caused solely by the negligent act of the servant in the course of his employment. The servant is liable because he is the active tortfeasor and committed the act which caused the injury. Being the real actor, he is nonetheless liable because acting for another. The master is liable because of the doctrine of respondeat superior,—the rule of law which holds the master responsible for the negligent acts of his servant while acting within the scope of his employment. They may be sued jointly for the injury.

In this case the complaint charges that Ferd Meier, by his agent and son, Vern Meier, negligently and carelessly drove his automobile so as to injure the plaintiff. Both were made parties defendant to a tort action, and if neither had been dismissed a judgment could have been legally entered against them jointly for the commission of a tort. However, if a verdict was rendered against one only of the two defendants, it would be good, even though the complaint still charged joint negligence. *Linguist v. Hodges*, 248 Ill. 491, 94 N. E. 94.

In this case instead of a verdict being returned against one defendant in a joint action the plaintiff elected to dismiss one defendant, leaving one in the complaint without amending it. No good reason can be advanced why the verdict would be good in one case and not in the other. The complaint alleges that the negligent acts were done and performed by Vern Meier, and the father was claimed to be jointly liable because of the tortious act of a servant.

When the complaint was dismissed as to the father, the facts constituting the careless and negligent acts of the son were still alleged in the complaint and must necessarily relate to the remaining defendant to the same extent as at the time it was filed, except as to the descriptive matter showing his relation to the other defendant. This descriptive matter showing him to be the employee or son of the dismissed defendant was now purely descriptive matter and surplusage. If the defendant desired a more complete and detailed statement it could have been obtained by a motion under section 42 of the Civil Practice Act. This section also provides that any objection to a pleading in substance or form is waived by a failure to raise objections in the trial court.

The case of *Klawiter v. Jones*, 219 Ill. 626, 76 N. E. 673, has no application to the present case because no facts were there alleged which would make more than one party liable and the party against whom liability was properly charged being dismissed left a complaint that had no charge whatever against the remaining defendant. A good complaint under the Civil Practice Act is one that reasonably informs the defendant of the grounds of the plaintiff's suit. The defendant knew in the first instance that he was charged with a negligent and careless act which created a liability upon his own part and upon the part of his father. He knew also that when Ferd Meier, his co-defendant, was dismissed out of the case by the plaintiff that there was no change in the character of the facts alleged against him, the remaining defendant, and was reasonably informed that the plaintiff was holding him liable for such acts.

This was a sufficient complaint against him and if it lacked formality could have been cured by motion, and not having made the motion the appellant is now in no position to question the sufficiency of the complaint. . . .

Judgment affirmed.

NOTE

McDonough v. Southern Oregon Mining Co., 177 Or. 136, 155-156, 159 P.2d 829 (1945): Action for specific performance in which, after a trial of the issues of fact, a decree, from which defendant appealed, was rendered for plaintiffs. Among the errors assigned by defendant was the failure of the complaint to state facts sufficient to constitute a suit in equity. *Affirmed*. "The requirement that a pleading must state a cause which entitled the pleader to relief is, of course, fundamental. The failure of a complaint to meet that basic requirement may be presented, as the appellant argues, for the first time on appeal. In fact, the objection is self-assertive. But, as has been held hundreds of times, attacks upon complaints diminish in potency the longer they are postponed. If the objection is voiced for the first time in the appellate court, a complaint, however defectively it may phrase a cause, can turn aside the best worded attack. It is vulnerable to a postponed attack only if it wholly fails to state a cause of suit or of action, as the case may be. When the attack is tardy, everything inferable from the language actually used is deemed pleaded. The authorities which we have already reviewed indicate that the averments of the complaint were sufficient for a suit entitling the respondents to the specific performance of the construction covenants of the lease agreement."

BOOTH v. MOODY

Supreme Court of Oregon, 1896. 30 Or. 222, 46 P. 884.

Opinion by MR. JUSTICE BEAN. This is an appeal from a judgment rendered in favor of the plaintiff in an action brought by him to recover commissions as a real estate broker. The principal question presented is the sufficiency of the complaint, and is raised in this court for the first time. Omitting formal parts, it is as follows:

"1. That at all the days and times hereinafter mentioned the plaintiff was and for a long time prior thereto has been and now is a real estate agent and broker, carrying on business as such agent and broker in the City of Salem, Marion County, Oregon. 2. That at the City of Salem, in Marion County, Oregon, in or about the month of May, 1895 (sic) the defendant employed the plaintiff, as such broker and agent, to find, obtain, procure, and produce a purchaser for the defendant's farm of sixty acres near Salem aforesaid, and the defendant agreed to pay the plaintiff for his said services the customary commission or fee of five per cent. upon the selling price of said land. 3. That immediately thereafter the plaintiff entered upon the performance of his duties under said contract with said defendant, and continued to perform his said duties thereunder, to find, obtain, procure, and produce such purchaser, and so continued his said services until the month of January, 1893, when the plaintiff found, obtained, procured, and produced W. G. Westacott and W. J. Irwin, co-partners doing business under the firm name and style of Westacott and Irwin, at Salem, aforesaid, as purchasers for the defendant's said farm at and for the agreed price or sum of \$6,000. 4. That the plaintiff's said commission on said sum of \$6,000 at said rate of five per cent. amounts to the sum of \$300, and the plaintiff's said services are reasonably worth the said last mentioned sum. 5. That all times have elapsed, and all acts have been done, and all things happened, under the said contract of agency, to entitle the plaintiff to his said commission of \$300, but said defendant has not paid the same nor any part thereof."

Defendant's counsel contend that the complaint is defective because it does not aver either that the land was sold to the parties produced as purchasers by the plaintiff, or that such parties were ready, able, and willing to purchase at the price fixed by the defendant, and that he refused to consummate the sale. In this position they are abundantly supported by authority. The rule unquestionably is that before a real estate broker can recover his commissions he must allege and prove either that he

was the procuring cause of an actual sale, or that he produced a purchaser, ready, able, and willing to purchase upon the terms named by the vendor: *Fisk v. Henarie*, 13 Or. 156 (9 P. 322); *Kyle v. Rippey*, 20 Or. 446 (26 P. 308); *Penter v. Staight*, 1 Wash. 365 (25 P. 469); *Jacobs v. Shenon*, 2 Idaho 1002 (29 P. 44); *Fraser v. Wyckoff*, 63 N. Y. 441; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (22 Am. Rep. 440); *Sayre v. Wilson*, 86 Ala. 151 (5 So. 157); *Hayden v. Grillo*, 26 Mo. App. 289. The complaint before us does not comply with this rule. There is no allegation therein that the land was actually sold by the defendant to a purchaser produced by the plaintiff, or, indeed, that it was sold at all. Upon this matter the complaint is silent. It simply alleges that plaintiff procured Messrs. Westacott and Irwin as purchasers at and for the agreed price of \$6,000, but does not aver that the land was sold to them, or that the sum named was the price fixed therefor by the defendant, or that he ever agreed to sell for that sum, or that the parties produced by the plaintiff as purchasers were ready, able, and willing to purchase the land at a price fixed by the defendant. In the absence of an allegation either that the land was actually sold, or that the purchaser was ready, able, and willing to purchase on the terms of the vendor, the complaint is manifestly insufficient, and the judgment will have to be reversed, unless the defect is cured by the verdict.

Now, a verdict will cure formal defects in a pleading, such as imperfect statement or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated, but it will not supply a total omission to state some fact essential to the cause of action. In short, a verdict will aid a defective statement of a cause of action, but will not cure the omission of a material allegation: *David v. Waters*, 11 Or. 448 (5 P. 748); *Weiner v. Lee Shing*, 12 Or. 276 (7 P. 11); *Bingham v. Kern*, 18 Or. 199 (23 P. 182). It is often difficult to distinguish between a defective statement in a pleading which a verdict will cure, and a failure to state a cause of action not so cured. The extent and principle of the rule of aid by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict. The

rule in such cases, as laid down by Mr. Proffatt in his work on Jury Trials, and which seems to have been adopted by this court in *Houghton v. Beck*, 9 Or. 325, is that "a defect in pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required on the trial proof of the facts defectively stated or omitted, without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict": Proffatt on Jury Trials, § 419. Applying these principles to the case at hand, we are of the opinion that the defect in the complaint was not cured by the verdict, because it does not contain terms sufficiently general to include the matter omitted, and the issue joined was not such as required the proof thereof on the trial. In other words, the allegations of the complaint could have all been proved without proving the facts omitted, and this is the test laid down by Mr. Justice Thayer in *David v. Waters*, 11 Or. 448 (5 P. 748).

It follows that the judgment must be reversed, and it is so ordered.¹

NOTES

(1) *Goodwine v. Cadwallader*, 158 Ind. 202, 205, 61 N. E. 939 (1901): "If an averment essential to the sufficiency of a pleading is omitted therefrom, and the special finding (made after a trial of the issues of fact) finds said omitted averment, which, if it had been contained in the pleading, would have rendered the same sufficient, this will not supply the allegation omitted, or otherwise cure the defect in the complaint, for the reason that such a finding is outside the issues and must be disregarded."² Cf. *McCourt, J.*, dissenting, in *Duby v. Hicks*, 105 Or. 27, 44, 209 P. 156 (1922): "The complaint discloses but one defect, the omission of a clause in the description of the lien notice. . . . The lien notice contains the clause omitted from the description and it is manifest that its absence from the complaint is due to inadvertence or oversight likely to occur in such cases. The defect would have been corrected upon the slightest suggestion made before or at the trial. The lien notice was a public record, advising defendant even before the complaint was filed that it embodied all the essential statements required by the statute. Defendant could gain no possible advantage from the defect in the complaint, unless plaintiffs remained in ignorance thereof until after the decree."

¹ See *Duby v. Hicks*, 105 Or. 27, 209 P. 156 (1922); *Inhabitants of Town of Milo v. Milo Water Co.*, 129 Me. 463, 152 A. 616 (1930); *United States v. Payne*, 73 F.2d 900 (C.C.A. 9th, 1934); *Hannan v. Greenfield*, 36 Or. 97, 58 P. 888 (1899); *Buckman v. Hatch*, 139 Cal. 53, 72 P. 445 (1903); *Reed v. Browning*, 130 Ind. 575, 30 N.E. 704 (1892); *Cleveland, C. C. & St. L. Railway Co. v. Parker*, 154 Ind. 153, 56 N.E. 86 (1900).

² Cf. *United States v. Payne*, 73 F.2d 900, 901 (C.C.A. 9th 1934): "Nor can a complaint which wholly fails to state a cause of action be cured by evidence, even though that evidence, if properly pleaded in the first place, might have put the complaint beyond the reach of demurrer."

(2) *Feigenspon v. Penn*, 350 Mo. 821, 168 S. W. 2d 1074 (1943): "We must also sustain appellants' contention that the petition is insufficient for failure to allege that the defendants own the real estate sought to be recovered, or any interest therein. . . . Nor did defendants waive the defect in the petition by answering over after their demurrer was overruled. . . . Oral evidence as to the ownership of the land was received, but as this went in over the defendants' objection, the petition will not be considered as amended to conform to the evidence. . . . nor can the petition be amended in this court. . . ." ³

DACUS v. BURNS

Supreme Court of Arkansas, 1944. 206 Ark. 810, 177 S.W.2d 748.

HOLT, JUSTICE. This litigation originated in the Blytheville Municipal Court. Appellee sued appellant for a real estate commission in the amount of \$100. He alleged, in his complaint, "that the Defendant is indebted to said Plaintiff in the sum of One Hundred Dollars (\$100.00) for Commission on Real Estate sale, which is now due and unpaid." Hatcher Doan was made garnishee and the usual allegations and interrogatories were attached. Appellant answered with a general denial. A trial in the Municipal Court resulted in a judgment for appellee in the amount of \$100, and on appeal to the Circuit Court, a jury returned a verdict for appellee for a similar amount. From the judgment comes this appeal.

Appellant says: "There is only one question involved in this appeal: Did the lower court err in refusing to direct a verdict for the defendant below because of plaintiff's failure to observe Section 12477, Pope's Digest? Said Section provides 'no recovery may be had by any broker or salesman . . . unless he is licensed . . . and unless such fact is stated in his complaint.' "

At the trial, appellee testified:

"Q. You are engaged in real estate business here in Blytheville, Mr. Burns? A. Yes, sir.

"Q. Are you a licensed real estate dealer in the city of Blytheville and state of Arkansas? A. Yes, sir.

"Q. And were you in January and February of 1942? A. Since 1929."

This testimony was not objected to by appellant and stands uncontradicted.

³ Cf. *Bauer v. Nenzil*, 66 Cal. App.2d 1020, 152 P.2d 47 (1944): "None but a defect at an essential point will justify an order sustaining an objection to the receipt of any evidence."

Section 1463 of Pope's Digest provides: "The court may, at any time, in furtherance of justice, . . . amend any pleadings . . . by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading . . . to the facts proved."

In the instant case, while appellee did not specifically allege in his complaint that he was a licensed real estate dealer, however, without objection, he testified that he was a licensed dealer at the time the sale in question was made and had been so licensed since 1929. As indicated, appellant offered no objection to this testimony. Had appellant made timely objection by demurrer to the complaint or otherwise, the complaint could have been amended at that time. Obviously, we think the situation presented is one covered by the above statutory provisions. The amendment did not change substantially the claim of appellee and the trial court properly treated the complaint as amended to conform to the proof.

In *Bank of Malvern v. Burton*, 67 Ark. 426, 55 S. W. 483, 484, this court held: (Headnote 2) "Where no objection was taken to the admission of evidence that the note sued on was given in renewal of a valid note, the complaint was properly treated by the trial court as amended to conform to the proof.", and in the body of the opinion, it is said: "Under the statutes of this state the complaint could have been amended by conforming it to the facts proved, as the amendment would not have substantially changed the claim of the plaintiff. Sand. & H. Dig. § 5769. (Now § 1463 Pope's Digest) The testimony adduced by both parties showing that the first note in a series of notes given for the same indebtedness, of which the note sued on was the last, was a valid note, having been admitted without objection, the complaint should have been regarded as amended in conformity to the same, As the complaint could have been amended in the manner suggested, and evidence was admitted as if it had been, it would be unjust to deny the plaintiff the benefit of it. Had its competency been objected to, the objection might have been obviated by an amendment on terms or otherwise. The plaintiff was therefore entitled to the benefit of it." See also *Hendrick v. Hendrick*, 180 Ark. 550, 21 S. W. 2d 961.¹ . . .

Finding no error, the judgment is affirmed.²

¹ The court's discussion of certain cases relied on by appellant, which the court distinguishes, is omitted.

² Cf. *Jensen v. Jensen*, 20 Wash.2d 380, 381, 147 P.2d 512 (1944): "While the sufficiency of the complaint may be challenged at any time, it will, after trial and judgment, be most liberally construed. . . . Under such circumstances, a complaint will be deemed amended to conform to proof. *Rea v. Eslick*, 87 Wash.

NOTES

(1) *J. R. Watkins Co. v. Chapman*, 197 Okl. 466, 172 P. 2d 768 (1946): Action upon a contract whereby defendant guaranteed the payment of the purchase price for goods sold by plaintiff to one Bebout. Plaintiff alleged that between August 23, 1940, and January 7, 1941, plaintiff sold Bebout merchandise of the value of \$829.37, of which merchandise of the value of \$365.06 was sold him prior to November 8, 1940. By his answer defendant alleged that on the date last mentioned he requested the plaintiff in writing to discontinue selling Bebout but that plaintiff ignored his request; that shortly after February 14, 1941, pursuant to plaintiff's authorization he returned to plaintiff merchandise of the value of \$537.66 which plaintiff had theretofore sold Bebout, but that plaintiff credited Bebout with only \$371.13. Plaintiff's demurrer to the answer was overruled, and plaintiff appealed from a judgment entered upon a verdict for defendant. Apparently, plaintiff conceded (and the court held) that defendant had the right to terminate the contract of guaranty on November 8, 1940, but contended that the answer did not state a good defense with respect to the merchandise which plaintiff sold Bebout prior to that date because it did not allege that plaintiff was directed to apply the credit for the merchandise returned in February, 1941, to Bebout's indebtedness for merchandise sold prior to November 8, 1940. *Affirmed*. "The question, however, is not whether the answer stated a good defense, but whether the defects therein were amendable. It must be remembered that the judgment herein was based on a general verdict of the jury and that the evidence is not before us. Defects in pleadings may be cured by proof supplied at the trial without objection. *Van Horn v. Van Horn*, 193 Okl. 182, 141 P. 2d 1006. And a general verdict includes a finding of every material issuable fact in favor of the prevailing party. *Van Horn v. Van Horn*, above. Since an appeal by transcript does not bring up for review errors alleged to have occurred at the trial (12 O. S. A. § 956, note 17) the rule is that where the appeal is by transcript, a judgment will not be reversed because of amendable defects in the pleadings, but it will be presumed that there was sufficient competent evidence to sustain the verdict and that proof of the matters omitted in the pleadings was supplied at the trial without objection. *Van Horn v. Van Horn*, above. The omission to state that plaintiff was directed to apply the credit for the returned merchandise to that part of the account arising prior to November 8, 1940, was an amendable defect, for such an allegation would only strengthen, not change, the defense pleaded. See 12 O. S. 1941 § 317. It follows that we must presume that defendant offered proof at the trial that plaintiff was given such

125, 129, 151 P. 256, 257: "While the objection that a complaint fails to state a cause of action may be raised at any time (Rem. & Bal. Code, § 263 [P.C. 81, § 233]), we have often held that it may be waived by answering, going to trial, and treating the complaint as stating a cause of action. In such a case, the complaint, though vulnerable to the general demurrer, will be deemed amended to state the case actually tried." Cf. *Rosser-Moon Furniture Co. v. Harris*, 191 Okl. 607, 131 P.2d 1004 (1942); *Benson v. Williams*, 174 Or. 404, 149 P.2d 549 (1944); *Hart v. Erickson*, 63 Cal. App.2d 719, 147 P.2d 414 (1944).

directions as to application of the credit at the time of the return of the merchandise, and that the jury so found.”³

(2) *Crawford v. Crawford*, 222 Ky. 708, 2 S. W. 2d 401 (1928): Action upon a promissory note alleged to have been lost. Defendant demurred generally to the petition. The Court of Appeals held that the demurrer should have been sustained because the petition did not allege that the note was lost “without fraud on the part of the plaintiff,” but the trial court overruled it and defendant answered, denying that he executed the note, that it was past due and unpaid, and that it was lost. At the trial plaintiff proved that he loaned defendant \$1,000 “and took his note for it, which was left at the bank where it was given and made payable and was lost or misplaced (by the president of the bank) without any fraud on the part of plaintiff. . . . While this proof was admitted over the objection of defendant’s counsel, he declined, when asked by the court, to disclose the grounds of his objection.” There was a verdict for plaintiff, and defendant moved for judgment notwithstanding the verdict on the ground that the petition did not state facts sufficient to constitute a cause of action. The trial court granted the motion and rendered judgment dismissing the complaint. *Reversed*, with *directions* to enter judgment for plaintiff on the verdict. “If counsel had disclosed to the court, when called upon to do so, the basis of his objection [to plaintiff’s proof], the error could have been readily obviated and injustice avoided. Under such circumstances, we are of opinion that the evidence and verdict cured the defect in the petition and entitled the plaintiff to judgment upon the verdict of the jury.”⁴

(3) *George v. Jensen*, 49 N. M. 410, 165 P. 2d 129 (1946): “The plaintiff presents three alleged errors, the first being that the court erred in permitting defendant to avail himself of the defense of contributory negligence on plaintiff’s part in the absence of a special plea raising the issue. . . . [T]he issue . . . was raised by repeated questions asked witnesses during the course of the trial without objection by plaintiff. . . . A rule of civil procedure in effect when this case was tried provides: ‘Amendments To Conform To The Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*’ (Emphasis ours). 1941 Comp. 19-101, (rule 15(b)). This rule, although derived from Rule 15 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and identical therewith, is but declaratory of a rule long obtaining in this jurisdiction that absence of a pleading to support the proof is waived when a party litigates the issue without objection.”

³ Cf. *Riddle v. Brann*, 191 Okl. 596, 131 P.2d 999 (1942).

⁴ Cf. *Claughton v. Johnson*, 47 Wyo. 536, 542-545, 41 P.2d 527 (1935)

(4) In *Cussell v. Cochran*, 114 Ind. App. 115, 50 N. E. 2d 668 (1943), the court held that the trial court correctly denied defendants' motion in arrest of judgment after verdict for plaintiff. "Appellants did not demur to the complaint. Therefore, any defect in the complaint was waived. . . ." Defendants then petitioned the court for a rehearing on the ground that its decision conflicted with *Prudential Insurance Company of America v. Ritchey*, 188 Ind. 157, 119 N. E. 369 (1918). Petition *denied*. (114 Ind. App. 117, 51 N. E. 2d 21 (1943).) "There the Supreme Court, after holding that the trial court did not err in overruling the demurrer of appellant because appellant did not point out in the memorandum filed with the demurrer the real defect in the complaint, said: 'By failing to point out this defect in the complaint by its demurrer, appellant *waived the right to question the sufficiency of the pleading at any later stage of the proceeding by a motion in arrest of judgment or by an independent assignment of error*, but it still had the right to insist that every material fact legally essential to a recovery against it should be established by a preponderance of the evidence. The purpose of the statute cited was to prevent the reversal of cases on account of defects in pleadings not pointed out by memoranda filed with demurrers. It was intended to reinforce other statutes providing that, after verdict, pleadings should be deemed amended as to such defects so as to conform to the evidence; but it was not the purpose to dispense with the proof of facts essential under the law to constitute a cause of action or a cause of defense. The failure of defendant to point out a defect in a complaint does not preclude him from *raising objections in any proper way* as to the sufficiency of the evidence to sustain every material fact essential to recovery whether such fact is pleaded or not. If there is a total want of evidence as to an essential fact, he may successfully raise the question by a motion for a new trial on that ground.'

Chapter X

PROCEDURAL IRREGULARITIES

SECTION 1. THE SPECIAL DEMURRER AND ITS ANALOGUES

STEPHEN, PLEADING

Williston's ed. 1895. * 152.* 155.¹

A special demurrer is necessary where [the objection] turns on matter of *form* only; that is, where, notwithstanding such objection, enough appears to entitle the opposite party to judgment as far as relates to the merits of the cause. For, by two statutes, 27 Eliz. c. 5, and 4 Ann. c. 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges "shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same;" the latter statute adding this proviso, "so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause." Since these statutes, therefore, no mere matter of form can be objected on a general demurrer; but the demurrer must be in the special form, and the objection specifically stated. But, on the other hand, it is to be observed, that, under a special demurrer, the party may on the argument not only take advantage of the particular faults which his demurrer specifies, but also of all such objections, in substance, or regarding "the very right of the cause," (as the statutes express it,) as do not require, under those statutes, to be particularly set down. It follows, therefore, that unless the objection be clearly of this substantial kind, it is the safer course, in all cases, to demur specially. With respect to the *degree* of particularity, with which, under these statutes, the special demurrer must assign the ground of objection, it may be observed, that it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, informal," or the like; but it is necessary to shew *in what respect*, uncertain, defective, or informal.

¹ Footnotes omitted.

FORM OF SPECIAL DEMURRER TO A DECLARATION

2 Chitty, Pleading (2d Am. ed. 1812) * 678.

In the K. B. (or "C. P." or "Exchequer.")——— *Term, 48 Geo. III.*

C D } And the said *C D*, by *E F*, his attorney, comes and de-
 ats. } fends the wrong and injury, when, &c. and says, that the
A B } said declaration, (or "*the said first count of the said decla-*
ration,") and the matters herein contained, in manner
 and form as the same are above stated and set forth, are
 not sufficient in law for the said *A B* to have or maintain
 his aforesaid action thereof against him the said *C D*, and
 that he the said *C D* is not bound by the law of the land to
 answer the same, and this he is ready to verify; wherefore
 for want of a sufficient declaration (or "*first count of the*
said declaration,") in this behalf, the said *C D* prays judg-
 ment, and that the said *A B* may be barred from having or
 maintaining his aforesaid action thereof against him, &c.
 And the said *C D*, according to the form of the statute in
 such case made and provided, states, and shows to the
 court here, the following causes of demurrer to the said
 declaration, (or "*to the said first count of the said decla-*
ration,") that is to say, that, &c. (*Here state the particu-*
lar causes, and conclude thus:) And also that the said de-
 claration (or "*first count of the said declaration,*") is in
 other respects uncertain, informal, and insufficient, &c.

NOTE

Dominelli v. Markowski, 2 Harr. 595, 128 A. 527 (Del. 1925):
 In an action to recover damages growing out of an automobile
 accident the declaration alleged that the accident occurred "on or
 about the 11th day of September, A. D. 1924." Defendant de-
 murred generally to the declaration, and upon argument con-
 tended that this allegation was indefinite and insufficient. De-
 murrer *overruled*. "The omission of the definite date of the
 happening of the accident was a violation of the rule of pleading
 which was framed to insure certainty," that is, that in personal
 actions "every traversable fact . . . must be alleged to have
 taken place on some particular day." "Objections for want of
 certainty, or indefiniteness, when raised by a demurrer, must
 be raised by a special demurrer. A general demurrer does not
 reach such defects which are of form only. Upon this question
 the authorities are in entire accord."

GEORGIA CODE ANNOTATED 1933

81-304. Demurrer; Nature; Grounds; Admissions by.—A demurrer denies the right to the relief sought, in whole or in part, admitting all properly pleaded allegations in the petition to be true, and is founded either upon the want of jurisdiction in the court, or of right in the petitioner, or upon the nonjoinder or misjoinder of parties or causes of action, or the absence of liability by the defendant to the petitioner. Special defects or omissions in the petition may always be taken advantage of by demurrer; and unless cured by amendment the petition shall be dismissed.

MISSISSIPPI CODE ANNOTATED 1942

§ 1497. Special Demurrer Abolished.—A pleading shall not be deemed insufficient for any defect which could heretofore be objected to only by special demurrer.

CURTIS FUNERAL HOME v. SMITH LUMBER CO.

Supreme Court of Vermont, 1945. 114 Vt. 150, 40 A.2d 531.

MOULTON, CHIEF JUSTICE. This is an action in contract. The writ and the original declaration are dated August 13, 1942. Upon motion and leave obtained an amended declaration was filed on February 23, 1944, to which the defendant demurred specially. The demurrer was overruled pro forma, and the cause has been passed to this Court, on defendant's exceptions, before final judgment in accordance with the provisions of P. L. 2072.¹ . . .

The defendant's thesis regarding the first two grounds of the demurrer is that the amended declaration alleges three separate causes of action, for nondelivery of part of the merchandise, for delay in delivering of part of it, and for delivery of certain window frames which were not of the dimensions specified in the contract; which is, in effect, that the declaration is bad for duplicity. Gould, Pleading, 4th Ed., 205.

Duplicity is a defect of form and not of substance. Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 489, 1 A. 2d 817. At common law this fault in a declaration could be reached only by a special demurrer. Lewis v. John Crane & Sons, 78 Vt. 216, 220, 62 A. 60; 1 Chitty, Pleading, 16 Am. Ed., 252; Gould, Pleading, 4th Ed., 430, n. 1. But under our Practice Act, which

¹ The court's summary of the declaration's allegations is omitted.

provides, P. L. 1578,² that a pleading shall not fail for want of form and that the sufficiency of all pleadings in this respect is for the discretionary determination of the trial court, the function of a demurrer is to test the sufficiency of a pleading in matters of substance only. *Coburn v. Village of Swanton*, 95 Vt. 320, 324, 325, 115 A. 153. The modern demurrer resembles the former special demurrer merely in that the Act, P. L. 1574, III, requires it distinctly to specify the reason why the pleading demurred to is insufficient. *Coates v. Eastern States Farmers Exchange*, 99 Vt. 170, 177, 130 A. 709. It follows that, in our practice, special demurrers as known in the common law have been impliedly abolished, and therefore duplicity in pleading, being, as we have seen, a defect in form, is to be reached by an appropriate motion under the provisions of P. L. 1578.³ A similar procedure obtains in other jurisdictions where special demurrers are no longer recognized. See *Ordinary of State v. Barnes*, 67 N. J. L. 80, 50 A. 903; *Gately v. Taylor*, 211 Mass. 60, 97 N. E. 619, 39 L. R. A., N. S., 472, 474; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *National Express Co. v. Burdette*, 7 App. D. C. 551, 558.

Under the circumstances, however, we treat the demurrer, in so far as it raises the question of duplicity, as if it were a motion under the statute, and had been regarded as such by the trial court. As it called for the exercise of discretion it was error to rule upon it *pro forma*. *Ainger v. White's Adm'x*, 85 Vt. 446, 450, 82 A. 666; *Fitzsimmons v. Richardson, Twigg & Co.*, 86 Vt. 229, 236, 84 A. 811. But in determining if the error is such as to require a reversal we may inquire whether there would have been an abuse of discretion if the trial court had held the declaration defective. *Russell v. Pilger*, 113 Vt. 537, 553, 37 A. 2d 403. If, as a matter of law, it is not duplicitous there was no room for the exercise of discretion and the *pro forma* ruling will be affirmed.⁴ . . .

The *pro forma* judgment overruling the demurrer is affirmed and the cause remanded.

NOTE

Paramount Publix Corporation v. Boucher, 93 Mont. 340, 344-345, 19 P. 2d 223 (1933): "It is generally held that a motion is not a pleading, though often 'directed at a pleading,' but mere

² This section [Vt. Pub. Laws 1578 (1933)] reads as follows: "A pleading shall not fail for want of form, but shall be amended in matters of form at any stage of the proceedings, if the fault is pointed out, and the sufficiency of all pleadings in this respect shall be for the discretionary determination of the trial court."

³ Cf. *Clark*, *Code Pleading*, 501 (2d ed. 1947): "[T]here was at common law, much as there is under the codes, a residuum of objections which were to be made by motion."

⁴ The court's discussion of this and other questions is omitted.

nomenclature is not important and, if a motion to strike parts, or the whole, of a pleading is based upon a ground for demurrer, the motion may be taken as a demurrer, and such a motion may be 'in fact and in substance' a demurrer. Likewise, when a demurrer is interposed on a ground which justifies a motion, the demurrer may be deemed a motion and relief granted. However, under the provisions of the Code, the demurrer and motion each has its own separate and distinct office, and neither can perform that of the other. A demurrer can be interposed only for one or more of the seven grounds enumerated in section 9131, Revised Codes of 1921, and, if a motion attacks a pleading upon a ground other than one on which a demurrer can be interposed, the motion cannot be deemed a demurrer. In other words, the demurrer and the motion may only be used interchangeably when either would reach the alleged defect. Thus, a 'motion' challenging the jurisdiction of the court, may be treated as a demurrer, for such a challenge is a ground for demurrer under subdivision 1 of section 9131, above." [Citations omitted.]

CALIFORNIA CODE OF CIVIL PROCEDURE ANNOTATED (1946)

§ 430. [Grounds for Demurrer.] The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;
2. That the plaintiff has not legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties plaintiff or defendant;
5. That several causes of action have been improperly united, or not separately stated;
6. That the complaint does not state facts sufficient to constitute a cause of action;
7. That the complaint is ambiguous;
8. That the complaint is unintelligible;
9. That the complaint is uncertain;
10. That, in actions founded upon a contract, it cannot be ascertained from the complaint, whether or not the contract is written or oral.¹

¹ See *supra* p 255, note 1. Cf. N. C. Gen. Stat. Ann. §§ 1-127, 1-128 (*supra* pp. 369, 375); N. Y. R. Civ. Prac. 106 (*supra* p. 371).

ALLEN v. THE CAROLINA CENTRAL RAILWAY COMPANY

Supreme Court of North Carolina, 1897. 120 N.C. 548, 27 S.E. 76.

FAIRCLOTH, C. J.: This case stands upon complaint and demurrer, and the ground of defence is "that the negligence alleged is not sufficiently and legally set out." The purpose of *The Code* is that controversies shall be tried on their true merits, and to this end it prescribes the mode, order and forms of pleading, with provisions for perfecting the pleadings in apt time, by striking out or amending the same.

When there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. *The Code*, Sections 259 and 261. For this purpose, however, the objector must move in apt time. It is too late after demurrer or answer. *Stokes v. Taylor*, 104 N. C. 394. This motion is addressed to the discretion of the court. *Conley v. Railroad*, 109 N. C. 692; *Smith v. Summerfield*, 108 N. C. 284.

The court may *ex mero motu* direct the pleadings to be reformed. *Buie v. Brown*, 104 N. C. 335. See generally Clark's *Code*, p. 207, Section 261.

The demurrer to the sufficiency of the cause stated brings to this court a question of form or uncertainty in the pleadings, and not the merits of the action, and thus costs and delay are incurred, which might have been avoided by a proper motion below, as we are to assume that the judge would have granted the proper motion, certainly until it appears otherwise.

Without commending the form in which the plaintiff has stated his case in the complaint, we think the defendant's remedy was by motion and not by demurrer. The case is remanded in order that the parties may proceed as they are advised. We must sustain the judgment below, but we do so without prejudice to the rights of either party to plead *de novo*.

Remanded.¹

¹ Cf. *Smith v. Summerfield*, *supra* p. 375, and *White v. Toombs*, 162 Kan. 585, 178 P.2d 206 (1947): Appellant "contends that plaintiff's right to recover for damages to herself and her right to recover under the . . . statute for damages to her husband, both resulting from the same alleged negligence of defendant, constitute but one cause of action, and that in fact plaintiff has improperly split her cause of action into two parts [by attempting to state two causes of action]. If we should assume that to be true, it is not a ground for demurrer set out in our statute. (G.S. 1935, 60-705.) It has been held that a demurrer to a petition must be upon some one of the grounds named in the statute."

NOTE

Marie v. Garrison, 83 N. Y. 14, 23 (1880): "Special demurrers, as known to the former practice, have no place in our present system of pleading. The Code authorizes a demurrer for specific causes and no pleading is demurrable unless it is subject to one or more of the objections specified in the section defining the grounds of demurrer. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. The remedy for indefiniteness is not by demurrer, but by motion. 'Indefiniteness,' says Chitty, 'is in general only matter of form.' (1 Chitty's Pl. 717.) The rule by which, under the Code, the sufficiency of a complaint is to be determined is stated by Denio, J., in *Zabriskie v. Smith* (13 N. Y. 330.) He says: 'It is sufficient that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language.'"²

GENERAL STATUTES OF NORTH CAROLINA 1943

§ 1-153. Irrelevant, Redundant, Indefinite Pleadings.—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleadings are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

NEW YORK RULES OF CIVIL PRACTICE

Rule 102. Motion to Correct Pleading.¹ If any matter contained in a pleading be so indefinite, uncertain or obscure that the precise meaning or application thereof is not apparent, or if

² Citations omitted. See Pomeroy, *Code Remedies*, §§ 442-443 (5th ed. 1929).

¹ Cf. Clark, *Code Pleading*, 547 (2d ed. 1947): "The motions raising objections to defective pleadings may be motions asking directly for a correction thereof, such as motions to make specified allegations more definite and certain, or motions to elect or to separate into counts, or motions which indirectly achieve the same result, as motions to expunge or strike out immaterial or improper allegations. At times a combination of such objections is made under the general heading of 'motion to correct.'" The author then proceeds to discuss these motions.

there be a misjoinder of parties plaintiff or a defect of parties plaintiff or defendant, the court may order the party to serve such amended pleading as the nature of the case may require.

Rule 103. Striking Out Matter Contained in a Pleading. If any matter, contained in a pleading, be sham, frivolous, irrelevant, redundant, repetitious, unnecessary, impertinent or scandalous or may tend to prejudice, embarrass or delay the fair trial of the action, the court may order such matter struck out, in which case the pleading will be deemed amended accordingly, or the court may order an amended pleading to be served omitting the objectionable matter.

A general or specific denial or an affirmative defense contained in a verified or unverified answer or reply may be struck out where such denial or defense is sham. Affidavits may be used to determine whether matter contained in a pleading is sham.

SYMINGTON v. HAXTON

Supra p. 191.

DUKE v. CRIPPLED CHILDREN'S COMMISSION, INC.

Supra p. 193.

KRAUSNICK v. HAEGG ROOFING CO.

Supra p. 195.

PARRISH v. ATLANTIC COAST LINE RAILROAD COMPANY

Supra p. 205.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. Defenses and Objections. . . .

(e) Motion for More Definite Statement. (See *supra* p. 256, note 4.¹)

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any

¹ See Note on the Motions for a More Definite Statement and for a Bill of Particulars, *supra* p. 255.

pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.²

GREEVE v. PATIK COAL CO.

Supreme Court of Iowa, 1942. 232 Iowa 803, 5 N.W.2d 184.

SAGER, JUSTICE. The nature of the controversy before us is clearly stated in this ruling of the trial court:

"And now, on this 25th day of November, 1941, this cause came on for hearing on demurrer of the defendant to the plaintiff's petition, and said demurrer is by the court overruled. Whereupon, this cause came on for further hearing on the defendant's motion to strike portions of the plaintiff's petition. And the court being fully advised in the premises finds that the defendant has heretofore filed a demurrer to the plaintiff's petition, and that the same has been submitted and overruled, and, that, having demurred to the plaintiff's petition, the defendant has waived the right to file any motion attacking said petition; that said motion is not filed timely, and that upon filing a demurrer and receiving an unfavorable ruling thereon the defendant could only elect to plead over on the merits or to appeal, and could not attack the same pleading by a motion, having al-

² Cf. N. J. Sup. Ct. Rules 41-42, *supra* p. 373.

ready demurred to said pleading. Whereupon, it is ordered that said motion to strike be and the same is hereby overruled."

Section 11109, 1939 Code of Iowa, is as follows:

"Pleadings are the written statements by the parties of their respective claims and defenses and are:

- "1. The petition of the plaintiff.
- "2. The motion, demurrer or answer of the defendant.
- "3. The motion, demurrer or reply of the plaintiff.
- "4. The motion, or demurrer of the defendant."

While this statute does not expressly declare in terms that this order of pleading be observed, any other construction such as was attempted by the pleader in the cause before us would or could make it impossible to bring a case to an issue.

The ruling of the trial court being in accord with our understanding of correct pleading, it is, therefore, affirmed.

Affirmed.

SECTION 2. THE CONFUSION OF FORM AND SUBSTANCE

KEIGWIN, CASES IN COMMON LAW PLEADING

2d ed. 1934. 442-443.

While the Statute of Elizabeth assumed a difference between matters of form and matters of substance, it did not define the difference or afford any principle of distinction. To the judges a rule of pleading was as much a law as any other legal institution, and for more than a century after the Act of Elizabeth the courts floundered in blind and sometimes inconsistent endeavors to find what defects were substantial and what merely formal.

At length, one hundred and twenty years after the Statute 27 Elizabeth, in 1705, Parliament enacted the Statute 4 and 5 Anne, c. 16, which, *inter alia*, re-enacted the Statute of Elizabeth, and proceeded to provide that a considerable number of specified defects in pleading—some of which had been held substantial, and as to some of which there was doubt—should be deemed matters of form, and so available only on special demurrer.

Even this enactment did not define the difference between form and substance. But it seems to have afforded a hint on the subject; and from that time there has been an increasing disposition of the courts to treat as formal all matters which are merely technical and to hold that defects which are but deficien-

cies in the mode of statement or departures from the rules of pleading shall be objectionable only upon special demurrer. No such principle of distinction has ever been formulated by authority; and it was, even so late as 1849, said that the differentiation "is governed by no fixed test."¹

SHARP v. COX

Supra p. 213.

AL RASCHID v. NEWS SYNDICATE CO.

Supra p. 215.

HOARD v. GILBERT

Supra p. 224.

STIVERS v. BAKER

Supra p. 226.

KELLEY v. KELLEY

Supra p. 237.

PEOPLE v. McCLOSKEY

Supra p. 247.

BRADFIELD v. BOARD OF EDUCATION OF
PLEASANTS COUNTY

Supreme Court of Appeals of West Virginia, 1945. 128 W. Va. 228,
36 S.E.2d 512.

HAYMOND, JUDGE. In this action of trespass on the case, . . . the trial court sustained the demurrer of the defendants, Board of Education, and the demurrer of the defendants, Cramblett and Lamp, to the declaration, and on its own motion certified the case to this Court. . . .

¹ Townsend v. Jemison, 7 How. 721, 12 L. Ed. 886. [Author's footnote. His other footnotes have been omitted.]

The plaintiff seeks to recover damages from the defendants because of their alleged negligence which resulted in the death of his child, a six year old girl, on January 28, 1944, while she was in the act of crossing a public highway. A bus of the Board of Education, in charge of Cramblett and Lamp, as its agents, had stopped on the road to discharge school children, including plaintiff's child, who had just alighted from it; and while she was running to cross the road, she was struck by the Drummond automobile as it was passing the bus from the opposite direction. . . .

In addition to the above averments other statements are incorporated in the declaration that the Board of Education provided at public expense and carried insurance against the negligence of its school bus drivers.¹ . . .

The points of law arising upon the demurrer of the Board and certified to this Court are:

1. Was the Board immune from liability for negligence of its employees at the time of the accident pleaded in the declaration, for the alleged reason that it was then engaged in the performance of a governmental function? [The court answered this question in the affirmative.]

2. Did the act of the Board in providing and carrying insurance against the negligence of drivers of school busses owned and operated by it, as pleaded in the declaration, impliedly abolish the existing immunity of the Board from liability for the negligence of its employees while driving and operating its busses in the performance of a governmental function? [The court answered this question in the negative.] ²

The remaining question for decision is the point of law, certified on both demurrers, involving the effect upon the legal sufficiency of the declaration of the allegation that the Board provided at public expense and carried insurance against the negligence of the drivers of its busses. Is such an allegation objectionable, and if so, can it be reached by demurrer? On this issue the plaintiff insists that it is material in this case, but if not material, it is mere surplusage which does not vitiate the declaration or expose it to attack by demurrer if the declaration is otherwise sufficient. The demurring defendants contend that the allegation of insurance is so objectionable that it destroys the whole declaration and renders it demurrable. Obviously if the statements in the declaration are mere surplusage they can not be dealt with on demurrer but must be reached by a motion

¹ See *supra* p. 193, note 1.

² The court's discussion of these grounds of the demurrer is omitted.

to strike the objectionable matter. This rule is supported by the weight of authority and our cases uniformly so hold.

To determine the character of the matter in question it is appropriate to consider the decisions of this Court in cases in which information that a defendant carries insurance against damages is made known to the jury at the instance of the plaintiff. [The court points out that in prior decisions the court had held that in actions for personal injury or death it is prejudicial error to admit evidence that defendant carries such insurance; that the error is not "sufficiently cured" by instructing the jury to ignore such evidence; that, therefore, the trial judge should in such a case sustain defendant's motion to discharge the jury and that, if he does not, the Supreme Court will reverse a judgment for plaintiff.]

. . . From the language of these cases it is manifest that evidence to support the challenged allegation in the declaration in this case, if admitted over objection, would call for a mistrial or the reversal of a judgment upon a verdict against the defendant. The same result would necessarily follow the disclosure of the contents of the allegation to the jury by a statement or comment of the plaintiff's counsel or by reading or exhibiting the declaration containing it to the jury at any stage of the trial before a verdict is returned. Usually the plaintiff offers and expects the admission of evidence to support the allegations of fact embodied in a declaration which has been held good on demurrer. The action of the court in overruling a demurrer to a declaration ordinarily indicates that evidence to support its allegations will be permitted to go to the jury; and it is evident that, if the court had overruled the demurrers in this case, the plaintiff would have offered evidence of the facts contained in the challenged allegation. Such action would have been highly prejudicial to the defendants.

Within the rule that pleadings are available for every purpose of the trial and need not be formally put in evidence in order to be considered by the jury, and that counsel, in presenting the case to the jury, has the right to read from and to comment on the pleadings for the purpose of showing the issues in the case, 53 Am. Jur. 393, the practice prevails in many, if not all, judicial circuits in this State, of ordinarily allowing counsel, subject to the discretion of the trial judge, to disclose the contents of a declaration to the jury and of permitting the declaration to be taken by the jury to its room for examination and the endorsement thereon of the verdict. By any of these methods the information concerning the insurance carried by the Board, contained in the declaration to that effect, would undoubtedly

be imparted to the trial jury. It is also reasonably to be inferred that it was planned and intended, in behalf of the plaintiff, to get this information to the jury by one of the above mentioned methods. If this had happened, over objection of the defendants, it would have been necessary to award a new trial. *Adams v. Cline Ice Cream Co.*, 101 W. Va. 35, 131 S. E. 867.

The statements in the challenged allegation could be entirely removed from the declaration only by filing an amended declaration, which is a new pleading, after a demurrer to the original declaration had been sustained. A motion to strike would not necessarily or completely eliminate the matter from the original declaration which, if that procedure be resorted to, would be the corrected pleading, upon which the case would be tried, instead of an amended declaration. The provisions of Rule VI, paragraph (e), of the Rules of Practice and Procedure for the trial courts of this State, promulgated by this Court, forbid amendments to pleadings by erasures, interlineations in or mutilations of the original, and require amendments to be made only by filing a new pleading, unless the court, by order, otherwise permits. There is no similar rule to govern a motion to strike.

Surplusage in a pleading consists of wholly foreign matter which is not essential to the statement of a cause of action or defense, 41 Am. Jur. 323; but it may be, and sometimes is, through inadvertence, or otherwise, proved upon the trial of a case. The proof of such matter is often treated as harmless error. The matter contained in the allegation here in question, however, can not be admitted in evidence without producing, upon objection, a mistrial or the reversal of a judgment based upon a verdict against the defendants. Under the holdings of this Court in the above cited cases forbidding the disclosure of insurance to the jury by the plaintiff, the objectionable matter in the allegation can not be regarded as surplusage. It is, in law, so objectionable as to render the entire declaration inadequate and insufficient to support a judgment for the plaintiff. This being so, it is properly reached by demurrer, which, under Code, 56-4-36,³ is the method prescribed to test the sufficiency of any pleading.

³ This section, which is W. Va. Code Ann. § 5591 (1943), provides in part: "The sufficiency of any pleading, in law or equity, may be tested by demurrer. . . . The form of demurrer shall be: The defendant (or plaintiff) says that the declaration (or other pleading) is not sufficient in law for the following reason (or reasons): All demurrers in civil cases shall be in writing and shall state specifically the grounds of demurrer relied on . . ." Section 5592 provides: "On a demurrer . . . the court shall not regard any defect or imperfection in the declaration or other pleading, whether it has heretofore been deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the

In view of the conclusion reached upon the controlling points arising upon the certification, it is unnecessary to discuss the other contentions advanced in the briefs of counsel.

The first question certified upon the demurrer of the defendant, Board of Education, is answered in the affirmative, the second in the negative and the third in the affirmative; and the question certified upon the demurrer of the defendants, Cramblett and Lamp, being identical with the third question certified upon the demurrer of the Board of Education, is also answered in the affirmative.

The rulings of the Circuit Court of Pleasants County are affirmed.⁴

action or defense that judgment, according to law and the very right of the cause, cannot be given. . . ." According to *Hays v. Heatherly*, 36 W. Va. 613, 618, 15 S.E. 223 (1892), the effect of this section was to abolish special demurrers.

⁴ Dissenting opinion of Kenna J., omitted. Cf. *Lubliner v. Ruge*, *supra* p. 211, Note (4).

Chapter XI

THE FINALITY OF THE DECISION OF AN ISSUE OF LAW

SECTION 1. AMENDING AND PLEADING OVER ¹

VARIETIES OF STATUTES AND RULES

§ 1. *Amendment before Ruling on Demurrer*

OKLAHOMA STATUTES (1941)

Tit. 12, § 314. Amendment of Petition before Answer.—The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings.² . . .

Tit. 12, § 315. Amendment on Filing of Demurrer.—At any time within ten days after the demurrer is filed, the adverse party may amend, of course, on payment of costs since filing the defective pleading.³

NEW YORK CIVIL PRACTICE ACT

§ 244. Amendments of Course. Within twenty days after a pleading, or the answer or reply thereto is served, or at any time before the period for answering it expires, or within twenty days after the service of a notice of a motion addressed to the pleading, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had. But if it is made to appear to the court that the pleading was amended for the purpose of delay and that the adverse party will thereby lose the benefit of a term for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just.⁴

¹ See Clark, *Code Pleading*, 527, 703-724 (2d ed. 1947).

² For a similar statute and rule, see Ark. Dig. Stat. § 1461 (1937); Wash. R. Prac. 6(1), Wash. Rev. Stat. Ann. § 3086 (1945 Supp.).

³ For similar statutes, see Cal. Code Civ. Pro. § 472 (1946); Idaho Laws Ann. § 5-904 (1943); Mont. Rev. Codes Ann. § 9186 (1935).

⁴ For an equally elaborate and comprehensive statute, see N. D. Rev. Code § 28-0736 (1943). For similar but less comprehensive and elaborate statutes, see Ind. Stat. Ann. § 2-1006 (Burns, 1933); Cal. Code Civ. Pro. Ann. § 472 (1946); Or. Comp. Laws Ann. § 1-1004 (1940).

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely granted when justice so requires.⁵ . . .

§ 2. *Amendments after Demurrer Sustained*

MISSOURI REVISED STATUTES ANNOTATED (1939)

§ 925. When Plaintiff May Amend. After a demurrer the plaintiff may amend, of course, and with or without costs, as the court may order. Upon the decision of the demurrer, the plaintiff may amend or the defendant withdraw his demurrer and answer.⁶ . . .

NORTH DAKOTA REVISED CODE (1943)

28-0735. Amendment of Pleading after Demurrer to It Sustained. . . . If a demurrer to any pleading is sustained, the court, upon such terms as may be just, may allow the party to amend such pleading.⁷ . . .

WYOMING COMPILED STATUTES ANNOTATED 1945

3-1706. Amendment When Demurrer Is Sustained.—If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by amendment, with or without costs as the court in its discretion shall direct.⁸

⁵ For a statute similar to this rule, see Mo. Rev. Stat. Ann. § 847.81 (Cum. Supp. 1946).

⁶ *Jones v. McGonigle*, 327 Mo. 457, 470, 37 S.W.2d 892, 74 A.L.R. 550 (1931): "Under this statute, when a demurrer to a petition is sustained the plaintiff . . . is entitled to an opportunity to amend as a matter of right. . . ."

⁷ For similar statutes or rules, see Cal. Code Civ. Pro. Ann. § 472a (1946); Mont. Rev. Codes Ann. § 9189 (1935); Or. Comp. Laws Ann. § 1-1005 (1940); Ky. Codes, Civ. Prac., § 94 (1938); Minn. Stat. § 544.39 (Henderson 1945); N. D. Rev. Code § 28-0735 (1943).

⁸ For similar statutes see Ohio Code Ann. § 11365 (1940); Okl. Stat. tit. 12, § 318 (1941); Me. Rev. Stat. c. 100, § 38 (1944).

§ 3. *Pleading After Demurrer Overruled*

KENTUCKY CODES, CIVIL PRACTICE (1938)

§ 133. Demurrer Overruled, Party May Plead. Upon a demurrer being overruled, the party demurring may file an answer, reply or additional pleading.⁹

SOUTH CAROLINA CODE ANNOTATED (1942)

§ 493. Amendments of Course, and after Demurrer. . . . After the decision of a demurrer, the court shall, unless it appear that the demurrer was interposed in bad faith, or for purposes of delay, allow the party to plead over upon such terms as may be just.¹⁰

NEW YORK CIVIL PRACTICE ACT

§ 283. Pleading after Disposition of Motion. If objections to a pleading, presented by motion for judgment or by corrective or regulatory motion, be not sustained, the moving party may serve an answer or reply, or an amended answer or reply where he has pleaded to a separate cause of action, counterclaim or defense not affected by the motion, as a matter of right, after the decision of the motion and before the expiration of ten days after service of notice of the entry of the order deciding the motion, unless the court shall be of the opinion, to be stated in the order, that the objections are frivolous. Upon the decision of a point of law, at trial or special term or in the appellate division or court of appeals, the court, in its discretion, also may allow the party in fault to plead anew or amend, upon such terms as are just.

⁹ In *Strode's Ex'x v. Strode*, 243 Ky. 367, 48 S.W.2d 543 (1932), it is said in substance that under § 133 a defendant has the right both to test the sufficiency of the plaintiff's petition by demurrer and, if the demurrer is overruled, to answer. For a similar statute, see Ark. Dig. Stat. § 1462 (1937). Cf. *Keljikian v. Star Brewing Co.*, 303 Mass. 53, 56, 20 N.E.2d 465 (1939): "Under [G.L. (Ter. Ed.) c. 231, § 19] it seems that judgment for the plaintiff can no longer be entered upon the overruling of a demurrer to the declaration, but that a defence to the merits must be permitted. . . . After a demurrer to the declaration has been sustained, however, . . . in view of the permissive and discretionary nature of the statutory power to allow amendment, a judge may refuse to permit a plaintiff to amend his declaration. G.L. (Ter.Ed.) c. 231, § 51."

¹⁰ For similar statutes, see Or. Comp. Laws Ann. § 1-1005 (1940); N. D. Rev. Code § 28-0734 (1943); Me. Rev. Stat. c. 100, § 38 (1944); Minn. Stat. § 544.29 (Henderson 1945).

OKLAHOMA STATUTES (1941)

Tit. 12, § 316. Answer or Reply When Demurrer Overruled.—Upon a demurrer being overruled, the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defense, and did not demur for delay.¹¹

MONTANA REVISED CODES ANNOTATED (1935)

9189. Amendment in Certain Cases. Upon the decision of a demurrer, the court may, in its discretion, allow the party in default to plead anew or amend, upon such terms as are just.¹²

PROBLEM

As the statutes set forth above indicate, it is often discretionary with the judges whether or not a party may amend his pleading. On the basis of those statutes and the following cases, what are the factors which judges do and should consider in determining how they will exercise their discretion in that regard?

MATSON v. TIP TOP GROCERY CO., INC.

Supreme Court of Florida, 1942. 151 Fla. 247, 9 So.2d 366.

Suit by Mary M. Matson against the Tip Top Grocery Company, Inc., to recover for injuries sustained when she fell as she was stepping down from a stool at a lunch counter in defendant's store. To review a judgment for the defendant, the plaintiff brings error.

[As set forth in the opinion of Buford, J., dissenting on the merits, in which Whitfield, J., concurred and which is omitted, the judgment rendered by the court below was as follows:

[“Plaintiff's declaration, as the court sees it, in view of the law in Florida as pronounced by the Supreme Court of Florida on the liability of the owner or occupant of premises for breach of duty to an invitee, fails to disclose any negligence on the part of defendant. The court is of the opinion that plaintiff has fully stated the situation and circumstances under which she sustained injury. The court is of the opinion that the declaration is beyond hope of amendment.

[“Without argument from counsel for either side, but the court being fully advised in the premises after research in the law, the court has reached the conclusion above stated.

¹¹ For a similar statute, see Ohio Code Ann. § 11362 (1940); Wyo. Comp. Stat. Ann. § 3-1703 (1945).

¹² For a similar statute, see Cal. Code Civ. Pro. Ann. § 472a (1946).

["It Is Thereupon Ordered

"1. That defendant's demurrer to plaintiff's declaration be, and the same is hereby sustained.

"2. That plaintiff take nothing by her suit and that the defendant go hence without day.

"3. That defendant recover from plaintiff all costs of this action in the sum of \$——, to be taxed by the Clerk of this Court, for which let execution issue.

"Done and Ordered at Chambers, Miami, Florida, March 26, A. D. 1941."]

ADAMS, JUSTICE. Writ of error was issued to a final judgment adverse to plaintiff after demurrer sustained to plaintiff's declaration. The pertinent part of the declaration is:

"That on to-wit, the 18th day of March, 1940, and for a long time prior thereto the defendant owned and operated a certain store at 27 N. W. 5th Street, in the City of Miami, Dade County, Florida, wherein the said defendant offered for sale to the public groceries and other kinds of merchandise, and as a part of the said store also kept and maintained a certain lunch counter at which the said defendant served to the public food, drinks and other refreshments; that the said lunch counter was on said date, and had for a long time prior thereto located upon a certain platform the floor of which was to-wit, twelve and three-quarter inches above the floor of the said store; that upon the said platform, around the edge of the said lunch counter, the said defendant erected and maintained a row of stools, which the said defendant provided for customers and patrons of the said lunch counter to sit upon while being served, and while eating; that the said defendant carelessly and negligently erected the said row of stools so close to the edge of the platform upon which the said stools were situated, that a patron in turning to step from said stool after eating would step directly from the said stool to the floor, which was a distance of to-wit, two feet, unless warned of the narrow space which was provided as a step from the said stool to the floor of the said store; that on the day and date aforesaid, the plaintiff was an elderly lady, and on said date the plaintiff went to the defendant's store for the purpose of purchasing such merchandise as her needs required; that the plaintiff went to the said lunch counter and purchased food, and after plaintiff had consumed the said food, plaintiff turned and started to proceed from the lunch counter into the said store; that the defendant carelessly and negligently permitted the said lunch counter and the platform upon which the same was kept and maintained by the said defendant to constitute a dangerous trap, in this: that the said row of stools upon the said platform, including the stool upon which the plain-

tiff had sat while being served as a patron of the said lunch counter, to be erected and maintained within a few inches from the outside edge of the said platform, and also so close to the said lunch counter that no room was provided upon which one could step from the said stool to the floor of the said platform, and from said platform to the floor of the said store, and said defendant carelessly and negligently failed to warn the plaintiff of the danger incident to dismounting from the said stool upon which she had been seated as aforesaid, so that plaintiff, upon dismounting from the said stool, attempted to step to the floor of the said platform, but fell from the stool to the floor of the said store, as a direct and proximate result of which said negligence, the plaintiff was rendered sick, sore, lame and disabled for a long period of time,"

The lower court said:

" . . . The court is of the opinion that plaintiff has fully stated the situation and circumstances under which she sustained injury. The court is of the opinion that the declaration is beyond hope of amendment."

If the plaintiff could have made a stronger case by amending she could have proffered such amendment by appropriate motion. Failing to do so, we will not hold the lower court in error for not allowing further amendment to the declaration. Furthermore, it appears to us as it did to the lower court that plaintiff had fully stated the ultimate facts of her case and further amendments could have disclosed no other or different facts.

The question is whether it is negligence for the proprietor of a public place to maintain steps or an uneven floor level and not give warning of same to persons invited upon the premises?

Plaintiff's status was that of an invitee. Defendant owed plaintiff the duty of maintaining the premises in a reasonably safe condition. *Moulden v. Jefferson Standard Life Ins. Co.*, 147 Fla. 36, 2 So. 2d 302. The law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer. Plaintiff was in turn obligated to exercise a reasonable degree of care for her own safety. It is common knowledge that there are steps and uneven floor levels in many public places. Such construction may be for convenience, necessity, artistic arrangement or to facilitate better merchandising. Such construction, when within reason, is not a breach of duty in the sense of failure to use due care for the safety of those invited upon the premises. It naturally follows then, that there is no duty to warn of an obvious condition which is not in itself dangerous. It is to be

observed that we are not dealing with a hidden danger. The duty which the plaintiff owes to herself is to observe the obvious and apparent condition of the premises. If she is derelict in observing the step down, she surely cannot complain that she was not warned. Her neglect to any appreciable extent which contributed to the injury is a complete bar to her recovery. For authority and further discussion see *Sterns v. Highland Hotel Co.*, 307 Mass. 90, 29 N. E. 2d 721; *Brooks v. Sears, Roebuck & Co.*, 302 Mass. 184, 19 N. E. 2d 39; *Boyd v. Logan Jones Dry Goods Co.*, 340 Mo. 1100, 104 S. W. 2d 348; *Mitchell v. George A. Sinn, Inc.*, 308 Pa. 1, 161 A. 538.

The judgment is affirmed.

NOTE

Provo City v. Claudin, 91 Utah 60, 72, 63 P. 2d 570 (1936): "It must be noted that the court may, upon sustaining a demurrer, refuse to permit an amendment to a pleading if it deems no amendment can be made which will circumvent the ruling. The implications of section 104-14-3¹ so speak. In such case, the pleader is virtually out of court. It is as if the court had said, 'Your pleading is not good in law and, under the facts as I apprehend they can be pleaded, you cannot state a good action or defense in law.' Naturally, it is not usually done on a first complaint or answer because the court cannot ordinarily know that other facts to make the pleading good cannot be pleaded. And a refusal to permit pleading over where it does not appear possible that no cause of action or defense can be pleaded may run easily into an abuse of discretion. But the power not to permit amendments is in the court after the trial of the issue of law."

PAGE v. NORTH CAROLINA MUTUAL LIFE INSURANCE CO.

Supreme Court of South Carolina, 1945. 207 S.C. 277, 35 S.E.2d 716.

FISHBURNE, JUSTICE. The appeal is from an order of the Circuit Court disallowing an amendment to defendant's answer, and granting judgment upon the pleadings in favor of the plaintiff.

The action was brought in October, 1942, by the plaintiff, as beneficiary, under an insurance policy issued by the defendant on the life of Dorothy Lee Page, to recover the amount alleged to be due in the event the insured should die by accident. Liability was predicated upon the allegation that the insured met her death solely by accidental means directly and independently of other causes.

¹ Of Utah Code Ann. (1943).

The answer, which was filed in due course, admitted the issuance and delivery of the policy, but denied that the insured died as the result of an accident. Elaborating upon the denial, the defendant alleged that the insured was killed by one Rosa Lee Powers, in the State of North Carolina, and that as a result of such criminal and intentional homicide, Rosa Lee Powers entered a plea of manslaughter. It was alleged in other paragraphs of the answer that "the insured came to her death as a result of a difficulty or intentional killing as aforesaid by or with one Rosa Lee Powers," and not as the result of accident within the terms of the policy. Liability was, therefore, denied.

On January 31, 1945, plaintiff served upon the defendant notice of a motion for judgment upon the pleadings, which matter thereafter came up for a hearing before the Circuit Judge. During the course of the hearing, and after the Judge had indicated his disposition to grant the motion, the defendant asked leave to amend its answer so as to allege that the insured was the aggressor in the altercation which preceded and brought about her death; and that the insured knew or should have anticipated that the other person might kill her in the encounter, and for that reason the death of the insured was not accidental within the terms of the policy.

The Circuit Judge ruled that there was no motion before him, and no showing upon which he would be warranted in permitting an amendment to the answer. He called attention to the fact that the answer, which had been served two and one-half years before, raised only the question that the killing was not accidental because it was intentionally done by a third party; that depositions had been taken by defendant in March, 1943, within a year after the service of the complaint, eliciting information as to the circumstances of the killing, and that no motion to amend the answer had been made thereafter. The order was then passed, granting judgment upon the pleadings, and denying the amendment.

In granting judgment, the Court relied upon the case of *Jennings v. Clover Leaf Life & Cas. Co.*, 146 S. C. 41, 143 S. E. 668, 670, in which the following principle is announced: "It is a well-established rule that where insured is intentionally injured by another, and the injury is not the result of misconduct or an assault by the insured, but is unforeseen in so far as he is concerned, the injury is accidental within the meaning of accident policies."

It will be observed that the exception mentioned in the foregoing rule is exactly what the defendant wished to allege in its

answer by way of amendment, and which was refused by the Court.

A motion for judgment on the pleadings is in the nature of a general demurrer. It is appropriate, where the pleading is fatally deficient in substance, that is, where the complaint fails to state a good cause of action in favor of the plaintiff and against the defendant, or where the answer fails to state a defense sufficient in law to the cause of action alleged by the plaintiff, or fails to tender any issue of facts in the case. Being in the nature of a demurrer, a motion for judgment on the pleadings raises an issue of law only. 41 Am. Jur., Sec. 335, Page 520.

When a demurrer to a pleading is sustained, the trial court is vested with a sound discretion in respect to the determination of the question, whether it will allow the party to amend his pleading, and this discretion will not be disturbed unless erroneously exercised. Ordinarily, permission will be given to amend if the objection can be obviated. In such case, it is usual and entirely proper to sustain the demurrer with leave to amend. *Blackwell v. First Nat. Bank of Columbia*, 185 S. C. 427, 194 S. E. 339; *Norris v. Brown*, 154 S. C. 138, 151 S. E. 274. . . . Apparently, the motion to amend was overruled because the Court deemed the conduct of appellant dilatory.

We think no other inference can be drawn from the record than that appellant believed it had stated a good defense in its answer, and that nothing more was necessary. Therein, the death of the insured by accident was definitely denied. It is true that entering into more detail, it was alleged that the insured was intentionally killed by a third person, but this defect in the pleading was not brought home to the defendant until the hearing. And it was then, as is usual and customary in such cases, that appellant made its motion to amend in the particulars shown.

It is quite clear that the answer is amendable; and that the proposed amendment, which will remove the objections suggested by the demurrer, should have been granted. *Privett v. Wilmington, C. & C. R. Co.*, 54 S. C. 98, 32 S. E. 75.

While the rule is universal that the action of the trial court as to matters within its judicial discretion will not be disturbed unless erroneously exercised, this does not give the trial judge an entirely free hand in what might be termed discretionary matters.

As was said in *Continental Radio & Television Corporation v. Furman*, 193 S. C. 357, 8 S. E. 2d 902, 903: "Generally the allowance of an amendment to a pleading is a matter largely in

the discretion of the trial court. Such discretion should not be arbitrarily exercised, either in the granting or refusing of motions made for that purpose, but should be exercised so as to prevent surprise and promote justice."

We do not think the case of *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278, cited in respondent's brief, is in point as supporting the contention that the trial judge correctly exercised discretion in disallowing appellant's proposed amendment. In that case, it was held that a motion made under the Code provision by the defendant, to amend an answer by setting up additional defenses made months after service of the answer, after one trial, appeal and new trial granted, on the grounds that defendant could not conveniently obtain the information on which the motion was based, should be refused.

In our opinion, the Circuit Court should have given the appellant an opportunity to make its motion to amend, and to be fully heard. And this must yet be done. . . .

The case is remanded, and leave is granted the appellant to move before the Court within ten days after the remittitur herein goes down, for an order permitting it to amend its answer, if it be so advised, so that it may present its defense on the merits.

Judgment reversed.¹

NOTES

(1) *Angers v. Sabatinelli*, 239 Wis. 364, 1 N. W. 2d 765 (1941): On a prior appeal (235 Wis. 422, 293 N. W. 173) the court held that plaintiff's *second* amended complaint did not state any cause of action against three of the defendants. Upon the remand of the case plaintiff filed a *third* amended complaint to which these defendants demurred on the ground that as to them it stated no cause of action. It appeared to the trial court from this and the prior complaints and from the decision on the prior appeal "that the facts reiterated in all of said complaints without change . . . negative the existence in plaintiff of any actual and just cause of action" against these defendants, and the court therefore sustained their demurrer, and ordered that plaintiff should not be permitted to amend unless he applied for leave to do so and tendered a pleading sufficient to withstand demurrer. No such application having been made, the court rendered judgment for the demurring defendants. *Affirmed*. The contention that no judgment can be rendered on the merits without a trial is without merit, and the contention that the denial to plaintiff of leave further to amend violated his constitutional rights is fantastic. A "plaintiff is not entitled to amend his complaint indefinitely. . . . Certainly whether plaintiff should be permitted to serve a fourth amended complaint rested

¹Cf. *Wood v. Colorado National Bank of Denver*, 109 Colo. 515, 127 P.2d 327 (1942).

in the sound discretion of the trial court. . . . The plaintiff has made three attempts to state a cause of action against these defendants. He has had the advantage of an exhaustive opinion by this court. By no stretch of the imagination can it be held that there was any abuse of discretion in withholding leave to file a fourth amended complaint except upon a proper showing."²

(2) *Wennerholm v. Stanford University School of Medicine*, 20 Cal. 2d 713, 718-719, 128 P. 2d 522, 141 A. L. R. 1358 (1942): Plaintiff's original and first four amended complaints charged defendants with negligence. In them she alleged that her family physician prescribed denitrophenol for her obesity; that defendants had stated in medical journals and elsewhere that the drug was harmless and that she and her physician had read and relied upon these statements; and that defendants knew or should have known that the drug was dangerous. But her fifth amended complaint charged defendants with fraud. In it she alleged that defendants were engaged in manufacturing and distributing drugs for human use; that by means of articles in newspapers, medical journals, etc., they falsely represented to the public that denitrophenol would relieve obesity and was harmless but that they knew or should have known that it was likely to cause blindness; that plaintiff read defendants' false representations and in reliance thereon purchased and took the drug and that, as a result, she became blind. General and special demurrers to this complaint were sustained without leave to amend, and judgment was rendered for defendants. *Reversed*. (i) The fifth amended complaint stated a cause of action for fraud and it was therefore erroneous to sustain the general demurrer thereto. (ii) "Where a complaint is sufficient against a general demurrer . . . , and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action if any of the grounds of special demurrer is well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading."³

HAYES v. TOWN OF CEDAR GROVE

Supreme Court of West Virginia, 1946. 126 W.Va. 828, 37 S.E.2d 450.

FOX, JUDGE. In May, 1943, plaintiff, Wilburn Hayes, while employed by the defendant, Town of Cedar Grove, a municipal corporation, was injured by falling from a truck being used in

² Cf. *Laughlin v. Garnett*, 138 F.2d 931, 932, 78 App.D.C. 194 (1943): "Since the complaint before us is the fourth unsuccessful attempt of appellant to set out a cause of action against appellees we believe that the court properly denied further amendment." Cf. also *Chris Schroeder & Sons Co. v. Lincoln County*, 244 Wis. 178, 11 N.W.2d 665 (1943).

³ See Note, 141 A.L.R. 1363 (1942).

removing trash and garbage from the streets and premises adjacent thereto in said town. He thereafter instituted this action in the Circuit Court of Kanawha County, seeking to recover damages for such injury from the Town of Cedar Grove, basing his action upon alleged negligence in respect to the character of the truck so used, and the manner in which it was operated. In his declaration, he averred matters which this Court held showed that the enterprise in which the town was engaged, and from which plaintiff's injury resulted, was in the exercise of a governmental function, and that the town was immune from liability by reason thereof. *Hayes v. Town of Cedar Grove*, 126 W. Va. 828, 30 S. E. 2d 726, 156 A. L. R. 702. That case was decided upon the certification of the action of the trial court in sustaining a demurrer to the declaration.

. . . The first amended declaration was based upon the same theory of recovery as that contained in the original declaration.

On January 10, 1945, plaintiff was permitted to file a second amended and substituted declaration, which contains some additional allegations, but still relies upon the allegations of negligence contained in the original and first amended declarations. On January 19, 1945, plaintiff appeared and moved the court to amend his second amended and substituted declaration by inserting at appropriate points therein, the following language: "and to keep its streets where same was used in a reasonably safe condition"; and the language: "where the street was in a bumpy and unsafe condition"; and the further language: "on said bumpy and unsafe street." The quoted amendments were permitted to be made, and were interlined in the second amended and substituted declaration at points such as would, in effect, make the said declaration include a charge that the streets of said town were in an unsafe condition, and that the street at the point of the accident was in a bumpy and unsafe condition, thus alleging a cause of action under the provisions of Chapter 40, Acts of the Legislature, First Extraordinary Session, 1933, Michie's Code, 17-10-17. On the 24th day of February, 1945, the defendant, by its counsel, appeared and moved the court to strike from said amended and substituted declaration the language quoted above, on the ground that the insertion of said language created a new cause of action, which could not be set up by the amendment, which motion the court sustained. The defendant then filed its demurrer to the amended and substituted declaration, as deleted, on the ground that the same showed on its face that the alleged act of negligence of the defendant, which caused the injury of plaintiff, was committed by defendant in the exercise of a gov-

ernmental function, and that defendant was immune from liability therefor. This is the same objection that was made to the original and first amended declarations, which objections, in the form of a demurrer, both the circuit court and this Court had sustained. The circuit court sustained said demurrer, and, the plaintiff not desiring further to amend, his action was dismissed, and this writ of error followed.

Our decision in *Hayes v. Town of Cedar Grove*, supra, settles the law of the case alleged in the original and the two amended declarations. Without the language quoted above, and stricken from the second amended and substituted declaration by the circuit court, there could be no recovery by the plaintiff. The declaration, as amended by the insertion of the language quoted above, might present a cause of action under said Chapter 40. The question is, therefore, whether a cause of action under Chapter 40 aforesaid can be set up by an amendment to the second amended and substituted declaration.

It is well settled in this State that an amendment to a pleading may not set up a new cause of action; but an amendment to a declaration which merely amplifies the allegations therein, with respect to the same cause of action, may be made.¹ . . . Code, 56-4-24, provides: "Plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant; and, notwithstanding such appearance, in any action, suit, motion or other proceeding, the court, if in its opinion substantial justice will be promoted thereby, may, at any time before final judgment or decree, and upon such terms as it may deem just, permit any pleading to be amended, or material supplemental matter to be set forth in amended or supplemental pleadings, introducing a necessary party, discontinuing as to a party, eliminating from a multifarious bill all but one of the equitable causes of action alleged, or changing the form but not the cause of action, . . ." ² Under our present statute, a court may not permit an amendment to a pleading which changes the cause of action, and in the revisers' note it is stated that the language "but not the cause" was inserted for the purpose of emphasis and to conform to Court decisions.

We think it clear that our present statute fully conforms to our decisions on the point in question. That question was first considered by this Court in *Snyder v. Harper*, 24 W. Va. 206, wherein it was held: "After the appearance of the defendant the court should be liberal in allowing such amendments to the declaration, as tend to promote the fair trial and deter-

¹ *Cf.* *Rose v. Standard Oil Co.*, 56 R.I. 272, 185 A. 251 (1936).

² Reference to prior statutes is omitted.

mination of the subject-matter of controversy, upon which the action was originally really based; but no amendment should be allowed against the protest of the defendant, which introduces into the case a new substantive cause of action different from that declared upon and different from that which the party intended to declare upon, when he brought his action, though the amendment be such, as would in another count have been properly inserted in the original declaration, and the new cause of action was such, as could, if the plaintiff had so chosen, been united in the same suit with the original cause of action actually sued upon."

The same principle was followed in . . . *Morrison v. Judy*, 123 W. Va. 200, 13 S. E. 2d 751, 753. In the last-cited case the question was discussed in the following language: "While a rule of liberality has prevailed in the matter of amendments, and a wide discretion is vested in the trial court with relation thereto, it has always been held that an amendment may not change the cause of action. [Citations omitted.] On the other hand, where the identity of the cause of action is maintained throughout, an amended pleading which does nothing more than present grounds for recovery for the same cause of action, though different from those stated in the original pleading, is permitted. [Citations omitted.]"

The question is: Did the proposed amendments to the second amended and substituted declaration create a new cause of action? It is apparent that the cause of action alleged by the language quoted above . . . was intended to state a cause of action under the provisions of said Chapter 40 (1943 Michie's Code, 17-10-17) which, so far as pertinent to this action, reads: "Any person who sustains an injury to his person or property by reason of . . . any street or sidewalk or alley in any incorporated city, town or village, being out of repair may recover all damages sustained by him by reason of such injury, in an action against the . . . city, town or village in which such . . . street, sidewalk or alley may be, except that such city, town or village shall not be subject to such action unless it is required by its charter to keep the road, bridge, street, sidewalk, or alley therein at the place where such injury is sustained, in repair. . . ." The contention is made that this section merely deprives a city, town or village of asserting governmental immunity in actions for damages on account of negligence for failing to keep its streets in repair, it being settled law in this jurisdiction that the keeping of streets in repair is a governmental duty, and that, but for this statute, there would be no liability. We cannot agree with this contention. Clearly, we think

the statute creates a cause of action which did not theretofore exist.

In determining whether a new cause of action was alleged by the amendments aforesaid, it is proper to consider some of the differences between a cause of action under the statute, and one under the common law, where recovery for negligence is sought. In a common-law action, the burden is on the plaintiff to establish negligence. If there had been no immunity from the action for negligence against the Town of Cedar Grove, the plaintiff would still have been required to establish, by a preponderance of the evidence, some negligent act on the part of the town. On the other hand, if the action had been based upon Chapter 40 aforesaid, it would not have been necessary to prove negligence. The liability is absolute. This has been frequently stated by this Court. See *Taylor v. Huntington*, 126 W. Va. 732, 30 S. E. 2d 14, and cases there cited. There are other differences as to the rights of litigants, particularly in respect to assumption of risk, contributory negligence and negligence of fellow servants. The case which comes nearest to the case at bar is that of *Findley v. Railway Co.* [76 W. Va. 747, 87 S. E. 198]. There the plaintiff instituted an action under our wrongful death statute, known as Lord Campbell's Act, Code, 55-7-5, for the death of an employee of the railway company. During the second trial of the action, it was established that plaintiff was employed by the railway company in the performance of acts in interstate commerce, and that the action should have been instituted under the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq. Upon that development in the trial, plaintiff asked leave to amend his declaration and was permitted to do so, and thus, in effect, make his action one under the Federal Act. This Court held that that created a new cause of action.³ That is not exactly the case at bar, because there the change was from reliance upon a State statute to reliance upon a Federal statute for recovery, and the differences between the requirements under which the case should be tried, after the amendment, were manifest. Here, we have a case in which plaintiff, in the first instance, relied upon supposed common-law right of action, and, finding that he could not recover under that theory, has changed his action to one under the statute, in which, as indicated above, there are differences as to the evidence required to sustain a recovery, and in other particulars mentioned above. We think that the question here presented, being one of procedure in our courts, should be determined by our own statutes and decisions; but it

³ Cf. Note, 134 A.L.R. 779 (1941).

has been considered by courts of other jurisdictions, and, so far as we can determine, the great weight of authority is that a change of action from common law to a statutory action creates a new cause of action. On this point see *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 L. Ed. 983; *Parmelee v. Savannah F. & W. Ry. Co.*, 78 Ga. 239, 2 S. E. 686; *Bolton v. Georgia Pacific Ry. Co.*, 83 Ga. 659, 10 S. E. 352; *Charleston & W. C. Ry. Co. v. Miller*, 113 Ga. 15, 38 S. E. 338; *Allen v. Tuscarora Valley Ry. Co.*, 229 Pa. 97, 78 A. 34, 30 L. R. A., N. S., 1096, 140 Am. St. Rep. 714; *La Croix & Frere v. Eaton*, 99 Vt. 262, 133 A. 745.

We are therefore of the opinion that the interlined amendments to the second amended and substituted declaration, quoted at the beginning of this opinion, allege a new cause of action, which, under our statute and our decisions, cannot be made by amendment. *Snyder v. Harper*, *supra*, implies that a cause of action under our statute might have been set up in a separate count in plaintiff's original declaration; but the fact that, under the ruling in that case, it might have been so set up, does not mean that it may be set up by way of amendment. This is clearly stated in the *Snyder* case, and that case has never been overruled or departed from in any way. . . .

The judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.⁴

NOTE

Pioneer Reserve Life Insurance Co. v. Dunavant, 182 Okl. 58, 60-61, 76 P. 2d 1044 (1938): "The defendant also contends that the trial court erred in permitting the plaintiff to file his amended petition, changing the theory of the action from contract to tort. There can be no doubt that this was a departure from the theory of recovery sought in the original petition, which was the ordinary petition in contract on the insurance policy. But it does not necessarily follow that the judgment should be reversed for that reason. Amendments are allowed when they are necessary for the promotion of justice. The cases cited by defendant in support of this proposition are largely instances where the amendment, changing the theory of the case, was permitted on the actual trial of the case, or by way of reply. Manifestly in those cases the defendant was taken by surprise or was otherwise unfairly prejudiced by the untimely filing of the amendment, but in such a situation as we have here, where the amendment was permitted long prior to trial, and where the defendant had the same opportunity to prepare for trial as would have been

⁴ See *Gerstel v. William Curry's Sons Co.*, 155 Fla. 471, 20 So.2d 802 (1945); *Macknowski v. Hudson & Manhattan Railroad Co.*, 121 N.J.L. 373, 1 A.2d 373 (1938); *Smith v. Badlam*, 111 Vt. 328, 16 A.2d 182 (1940); *Page v. Bourgon*, 138 Me. 113, 22 A.2d 577 (1941).

afforded if the case had been dismissed and a new one filed, we see no reason for invoking the rule contended for by the defendant. The trial judge instructed the jury that the only issue before them was that of negligence; the case was tried entirely on that theory, and not contract. It is difficult to conceive how the defendant was harmed by permitting the amendment."

HARTFORD ACCIDENT & INDEMNITY CO. v. CLEGG

Supreme Court of Utah, 1943. 103 Utah 414, 135 P.2d 919.

WOLFE, CHIEF JUSTICE. . . .

[On January 7, 1929, defendant was appointed Treasurer of the Board of Education of Tooele County for a two-year term, and on January 7, 1931, he was reappointed for another term of two years. His official bond for his first term was fixed at \$20,000 and for his second one, at \$10,000; and they were furnished by plaintiff at his request. In the case of each bond he entered into a contract with plaintiff whereby in consideration of the execution of the bond by plaintiff he promised that he would pay plaintiff "any and all loss . . . and expenses of whatever kind or nature which said company shall or may for any cause at any time sustain or incur, or be put to, for or by reason or in consequence of said company having entered into or executed said bond."

[During defendant's first term as Treasurer he deposited \$150,000, and during his second term, \$33,444.86, to the Board's credit in a bank of which he was the assistant cashier and his father, the president; but to secure these deposits he required the bank to procure surety bonds aggregating only \$15,000. One week after the second of these deposits was made, the bank failed and closed its doors. The balance to the credit of the Board at that time was \$141,315.85, of which the Board succeeded in recovering only \$86,985.14 from the bank and its surety. The Board sued plaintiff on the bonds which plaintiff had executed in defendant's behalf, and plaintiff was compelled to pay the Board \$14,500. Plaintiff then brought this action to recover that amount and its expenses from defendant. Plaintiff's action was predicated upon the agreement whereby defendant agreed to indemnify plaintiff against losses sustained by reason of plaintiff's executing the bond for \$20,000. No reference was made in plaintiff's complaint to the execution of the bond for \$10,000 except that plaintiff alleged that it had paid the \$14,500 in settlement of its liability on both bonds. Defendant answered this complaint, alleging, *inter alia*, that plaintiff had executed the bond for \$10,000 and that if he had defaulted in his duties as Treasurer, the default occurred while that bond

was in effect. After a trial the judge decided that judgment should be entered for defendant.

[With the court's permission plaintiff then amended its complaint twice, but demurrers to these amended complaints were sustained. Over defendant's objection plaintiff was permitted to amend its complaint for the third time, and in this amended complaint alleged that it had executed the bond for \$10,000, as well as that for \$20,000, and that defendant had agreed to indemnify it against losses sustained by reason of its execution of the bond for \$10,000, as well as for losses sustained by reason of its execution of the bond for \$20,000. After a trial the court "allowed recovery on the \$10,000 bond on the theory that the defendant's default occurred during the life of this bond."]

In assailing this judgment defendant makes 23 assignments of error. He urges first that the minute order entered by the trial judge constituted a final judgment in favor of the plaintiff and that it was error to permit an amendment without first setting this judgment aside. However, there was no error in this regard for the minute order was not a final judgment. It did not purport to finally adjudicate the rights of the parties. It was neither a judgment of dismissal nor a judgment on the merits for the defendant. No provision was made for awarding of costs and it is obvious that something more was contemplated by the court. It was not supported by findings of fact and conclusions of law as we have consistently held that it must be to constitute a final judgment on the merits. *Wayland v. Woolley*, 61 Utah 287, 213 P. 200; *Emerson-Brantingham Imp. Co. v. Stringfellow*, 57 Utah 284, 194 P. 340. It must appear that that "which is offered as the record of a judgment is really such and not an order for a judgment or a mere memorandum from which the judgment was to be drawn." 33 C. J. 1190. This rule is in accord with the holding of this court in *Lukich v. Utah Construction Co.*, 46 Utah 317, 150 P. 298. See also *Day v. Mills*, 213 Mass. 585, 100 N. E. 1113, where the court held that a docket entry or an order for such entry was not a final decree.

The defendant's second contention is that the issue of his liability under the contract for subrogation contained in his application for the \$10,000 bond is a matter which should have been litigated in the trial which resulted in the entry of the minute order and hence must be considered foreclosed on the principles of *res adjudicata*. Our holding that the minute order did not constitute a final judgment disposes of this contention. This conclusion is inevitable, for since no final judgment had been entered in regards to any of these matters when the fourth

amended complaint was filed, the issues therein raised had not been adjudicated and could not be considered *res adjudicata*.

The third contention, that the court erroneously allowed plaintiff to amend to state an entirely new cause of action, raises a more difficult problem. The original complaint was based on the defendant's undertaking in regards to the \$20,000 bond. It did not allege, and at the first trial plaintiff did not urge, defendant's liability in regard to the \$10,000 bond. The court allowed plaintiff to amend to base its claim on the theory of equitable subrogation and on the undertakings of the defendant in regard to *both* the \$10,000 and the \$20,000 bonds. It is well established, as defendant contends, that the power of the court to permit an amendment of the pleadings does not extend so far as to permit the importation of an entirely new and different cause of action. [Citations omitted.]

However, the rule that a new or different cause of action cannot be introduced by amendment cannot be taken literally. As pointed out by the California Supreme Court in a recent case, *Klopstock v. Superior Court*, 17 Cal. 2d 13, 108 P. 2d 906, 910, 135 A. L. R. 318:¹ "It is obvious that the unqualified way in which the rule is sometimes stated . . . cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a *new* cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly *different* cause of action' shall not be introduced." (*Italics added*)

In *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 280, 77 L. Ed. 619, Cardozo, J., states that the term "cause of action" "may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of

¹ It appeared in this case that three brothers, Isaac, Frederick and Samuel, were the sole stockholders and the directors of a corporation. Isaac died testate. He left his property to his wife, Grace, and appointed her his executrix. While his estate was being administered, Grace died, having appointed Samter her executor. Proceeding on the theory that Grace's estate was the beneficial owner of Isaac's stock, Samter, as Grace's executor, sued on behalf of the corporation to compel Frederick and Samuel to pay to the corporation certain sums alleged to have been wrongfully withdrawn by them. A demurrer to the complaint was sustained on the ground that Isaac's estate was not a party to the action and that Samter, as Grace's executor, was not the proper party to bring the action on behalf of the corporation. Samter then sought and obtained leave to amend his complaint so as to substitute the executor of Isaac's estate as plaintiff. *Cf. Box v. Roberts*, 112 Colo. 234, 148 P.2d 810 (1944); and see Notes, 121 A.L.R. 1325 (1939), 124 A.L.R. 86 (1940), and 135 A.L.R. 325 (1941).

the application of the principle of *res judicata*." He continues with an enumeration of other phases of the term.²

Courts have been particularly liberal in their construction of the term "cause of action" as it relates to the question of whether or not a new cause of action has been introduced by an amendment to pleadings. We have consistently encouraged all proper amendments to pleadings to the end of having a full hearing on the merits of the entire controversy. *Hancock v. Luke*, 46 Utah 26, 148 P. 452; *Harman v. Yeager*, 100 Utah 30, 110 P. 2d 352. This trend toward a liberal construction of the term is looked upon with favor in other jurisdictions. In *Klopstock v. Superior Court*, *supra*, the court stated in this regard: "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the *Frost* case, *supra* (*Frost v. Witter*), 132 Cal. (421), page 426, 64 P. (705), page 707, 84 Am. St. Rep. 53, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a *new cause of action* is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a *wholly distinct and different* legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant.³ See *Harriss v. Tams*, 258 N. Y. 229, 242, 179 N. E. 476." (Italics added)

The liberal construction is further illustrated by a recent Oregon case, *Elliott v. Mosgrove*, 162 Or. 507, 91 P. 2d 852, 93 P. 2d 1070, 1072, where the court makes a thorough analysis of the different concepts of the term "cause of action." The court quotes with approval from a law review article (33 Yale L. Journal 817) written by Judge Clark (author of Clark on Code Pleading) as follows: "The cause of action under the code

² Mr. Justice Cardozo, after the sentence quoted in the opinion in the Clegg case, said: "At times and in certain contexts, it ['cause of action'] is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause then being dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed. None the less, it has fixed the limits of amendment with increasing liberality."

³ Cf. *Milton v. Milton*, 195 Ga. 130, 23 S.E.2d 411 (1942).

should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.' He suggests: 'It seems that a single cause may give rise to innumerable rights. And the extent of our cause and the number of persons it may affect must be determined having in mind our main purpose, above referred to—convenient, efficient trial work. So our cause should be as extensive a history as we can conveniently and efficiently handle as a single unit, and without injury to substantive rights.'"⁴ The court later states: "Courts which are not over-attentive to the ancient common law forms of action, and which view the process of framing the issues, not as mere application of dry formulas, but as a practical means whereby the controversy between the parties may be ascertained and stated in convenient form for judicial attention, experience no difficulty in the application of Judges Phillips' and Clark's definition of a cause of action. They regard the term 'cause of action' as one which is broadly descriptive, and deem that its use is purely practical."

In *Pritchard v. Norfolk Southern Ry. Co.*, 166 N. C. 532, 82 S. E. 875, 876, this same question was raised. The court there stated: "We are of opinion that the filing of the amended complaint was a matter in the discretion of the court, and that, while it is practically an additional cause of action, it is so germane to the original cause of action that both may be considered in one action."

As viewed in the broader aspect this was but one series of transactions. The defendant argued strenuously in the court below and again here on appeal that this entire matter is so interrelated that plaintiff was required to plead both contracts in one action to avoid having the one not pleaded barred by principles of *res adjudicata*. It is upon this that he bases his second contention discussed above. The facts which would be adduced

⁴ In his Code Pleading, 137-138 (2d ed. 1947), Clark puts the matter in this way: "The cause of action must [for reasons which he gives] be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically by the court, having in mind the facts and circumstances of the particular case. Such extent may be settled by past precedents; but the controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules. Such purpose should be considered not from the vantage point of the study, but from the courtroom, looking at the facts as they will be presented at the actual trial. This means that a lay or nonlegal grouping of the facts into a single unit, as nonprofessional witnesses would naturally do, will be the most practicable. The cause will, therefore, comprise the material facts of the happening or affair or affairs giving rise to the dispute, or, as sometimes expressed, the 'defendant's wrongful act,' to which is added also the necessary background of events showing its wrongful nature."

to show a breach of either contract would to a certain extent also be competent to show the breach of the other. The dereliction of the defendant had to be alleged in almost the identical manner in regards to both contracts. The causes would have been properly joinable in the first instance and the defendant was not in any way misled. Nor has it in any way interfered with defendant's substantive rights. It enabled the court to settle an entire controversy and is in accord with the modern trend expressed in the cases cited above, which hold that the term "cause of action" when used in this regard is broadly descriptive, its use purely practical, and its bounds as extensive as can be conveniently and efficiently handled as a single unit without injury to substantive rights. Further, the court correctly protected the defendant's rights by giving him ample time to meet the new matter and awarding him costs. There was no error in this regard. This holding accords with trend expressed in several Utah cases which announce a policy of allowing amendments to pleadings for purposes of permitting complete adjudication of matters in controversy, i.e. to permit disposition of the case on its facts rather than on its pleadings. See *Johnson v. Brinkerhoff*, 89 Utah 530, 57 P. 2d 1132; *Stevens & Wallis v. Golden Prophyry Mines Co.*, 81 Utah 414, 18 P. 2d 903; *Harman v. Yeager*, 100 Utah 30, 110 P. 2d 352. It did not introduce an entirely different legal obligation. In the larger sense as herein used, the term "cause of action" is somewhat akin in meaning to the term "cause for the action." The cause for this action arose out of one series of transactions all so interrelated as to be most conveniently tried together as one unit. Fundamentally, plaintiff seeks to recover money expended in discharge of its liability as surety for the defendant, which expenditures were occasioned by the wrongful deposit of money in a bank without sufficient depository insurance and the failure of the bank. It should make no difference that defendant's duty arose out of one interrelated series of transactions rather than out of one single transaction.⁵

The judgment of the lower court should be modified to give the defendant credit for the \$1,588.75 which was paid by the liquidator of the bank to plaintiff. With this modification the judgment of the lower court is affirmed. Costs to respondents.⁶

⁵ Cf. *Clark, op. cit. supra* note 4, at 139: "If the cause is the general fact situation which gives the ground or occasion for the claimed remedy, it follows that the cause or ground remains the same so long as it is the same general situation which is considered and absolute reproduction of all the facts is not required. This is the rule applied, only substantial equivalence, not identity of the material facts, being sufficient." And see *id.*, at 715-724.

⁶ Cf. *Graham v. Street*, 109 Utah 460, 166 P.2d 524 (1946): "While some limit must be placed on amendments allowed, the limits are those set out in Hart-

LARSON, McDONOUGH, and MOFFAT, JJ., concur.

WADE, JUSTICE (concurring). I will discuss only the question of when amendments should be allowed. I agree that amendments should be liberally allowed in the interests of justice whenever it will aid in settling an entire controversy. The limitations thereon should be whether the matters involved are such as can be conveniently and effectively handled in one trial without injury to substantive rights. In this case the amendment was properly allowed.

As stated in the main opinion, this court has often said that an amendment will not be permitted which imports an entirely new and different cause of action, but in practice we have not always adhered to that rule. In *Hayden v. Collins*, 90 Utah 238, 63 P. 2d 223, we expressly allowed an amendment to the answer which introduced a new cause of action. In *Johnson v. Brinkerhoff*, 89 Utah 530, 57 P. 2d 1132, we allowed the plaintiff whose original complaint based his claim on a contract between plaintiff and defendant to file an amended complaint basing the same claim on a deed from a common grantor, thus relying on an entirely different instrument. To my mind, such an amendment, as well as the amendment which we are allowing in this case, under the great weight of authority, would amount to the importation of an entirely new and different cause of action. *Pomeroy's Code Remedies*, 4th Ed., Sec. 457, *566.

Although we have often held the rule to be as stated above, my research has only disclosed one case in which we have refused to allow an amendment on the ground that it would import an entirely new and different cause of action. See *Combined Metals, Inc. v. Bastian*, 71 Utah 535, 267 P. 1020. I believe that case to be in conflict with *Johnson v. Brinkerhoff*, *supra*, and with the present case. The term "cause of action" is used with many different meanings. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 280, 77 L. Ed. 619. Such a term leads to confusion rather than clearness of thought. Inherently, in order to efficiently handle the business of the courts and in the furtherance of justice there should be a liberal allowance of amendments. Some states have refused to adopt or follow the rule that a new cause of action may not be imported. *Brown v.*

ford Accident and Indemnity Co. v. Clegg, *supra*. It was there held that where the new allegations do not introduce matters which interject an entirely new, distinct and unrelated legal obligation but enlarge on the facts so as to present a series of transactions all germane and forming a connected whole reflecting the manner in which the plaintiff suffered injury, the bounds of an amendment are determined by what 'can [be] conveniently and efficiently [handled] as a single unit . . . without injury to substantive rights,' and this largely in the discretion of the trial court."

Leigh, 49 N. Y. 78, 12 Abb. Prac., N. S., 193; also see cases cited and discussed by Pomeroy cited above. Other states have enlarged the meaning of the term "cause of action" in order to reach the same result. See *Elliott v. Mosgrove*, 162 Or. 507, 91 P. 2d 852, 93 P. 2d 1070. The Oregon statute permits the court to allow amendments which "does not substantially change the cause of action," Code Or. 1930, § 1-906, thus it was necessary for the court to construe that term. Our statute contains no such provision or limitation. The only limitation which our statute places on the power of the court to allow amendments is that they must be allowed on "such terms as may be just," or "in furtherance of justice." Sections 104-14-1, 2, 3 and 4, Utah Code Annotated 1943. The rule would be much more definite and understandable if we omitted from consideration entirely the question of whether a new cause of action had been imported, rather than to enlarge the meaning of the term "cause of action."

DITMARS v. GRAND STORES, INC.

Court of Errors and Appeals of New Jersey, 1946. 134 N.J.L. 570, 49 A.2d 286.

COLIE, JUSTICE. The question for decision on this appeal is whether the defendant below was accorded the fundamental right of its day in court.

The facts are that the plaintiff brought suit in the district court to recover damages for the conversion of two suits of clothing which he had left with the defendant to be cleaned and which were destroyed by fire. When the suits were left at the defendant's establishment, plaintiff received a printed slip in the nature of a receipt which bore thereon the following: "All goods insured against fire and theft while in our possession". On the trial plaintiff testified to the delivery of the suits; to his demand for their return and the failure of the defendant to do so because of their destruction in the fire on the premises. The defendant's proof was directed solely to and established beyond question its freedom from negligence. The defendant then moved the trial judge for a judgment in favor of defendant on the ground that there was no evidence of negligence on its part. At this juncture "the court inquired of plaintiff's counsel for his position and was informed that plaintiff was relying on the contractual obligation on the part of the defendant which the evidence had established. The court denied motion of the defendant for entry of judgment as a matter of law and an exception was taken on behalf of the defendant to said ruling". The court reserved decision and subsequently entered judgment for the plaintiff in

the sum of \$65. On appeal the Supreme Court affirmed the judgment.

From the above summary of what transpired it is clear that the action was one for conversion of personal property, that the defendant presented a defense thereto which entitled him to a judgment; that the court took the matter under advisement and then entered judgment on the theory of a breach of the contractual obligation arising out of agreement by defendant that "all goods (are) insured against fire and theft while in our possession." The opinion of the district court judge states "Accordingly, plaintiff's request to amend is granted" and the opinion of the Supreme Court states that the district court judge "granted the bailor's motion to amend his state of demand to conform to the proofs". The state of case settled by the court discloses neither a "request" nor a "motion to amend" and we are bound by the record as so settled.

We are urged to affirm the judgment on the ground that the statute with reference to the power of amendment R. S. 2:32-6 N. J. S. A., justified the action taken. It reads: "In order to prevent the failure of justice by reason of mistakes and objections of form, any district court or the supreme court on appeal thereto, may at all times, amend all defects and errors in any action or proceeding, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing action the real question between the parties shall be so made."

It should be noted that the Legislature has confined this power of amendment to the prevention of the failure of justice "by reason of mistakes and objections of form". Here the defendant was haled into court to defend a tort action and a defense was put in on that theory. After the case was closed, the court, sua sponte, amended the state of demand to substitute a new and different cause of action to which the defendant had no opportunity to put in a defense.

In *Goodyear Tire and Rubber Co. v. Kruvant*, 96 N. J. L. 352, 115 A. 304, the Supreme Court by Mr. Justice Parker pointed out that applications for amendment are addressed to the discretion of the court and the decision is not reviewable and then added: "With this rule, however, goes necessarily the qualification that when an amendment of pleadings opens a new ground of liability or defense not before suggested, to the surprise of the other party, a due regard for the rights of the latter requires that he should

have reasonable opportunity to meet the new matter; otherwise he is liable to be condemned without a hearing in violation of elementary principles of justice and of the express intendment of the Fourteenth Amendment of the Federal Constitution".

The amendment of the state of demand substituting a new cause of action made without notice and with no opportunity afforded the defendant to enter a defense constitute a denial of a fundamental right and is reversible error.

The judgment under review is reversed with costs.

For affirmance: JUSTICES HEHER and WACHENFELD, and JUDGES WELLS and RAFFERTY.—4.

For reversal: The CHIEF JUSTICE, JUSTICES PARKER, DONGES, COLIE, and OLIPHANT, and JUDGES DILL, FREUND, MCGEEHAN, and MCLEAN.—9.¹

OREGON COMPILED LAWS ANNOTATED (1940)

§ 1-1006. Amendments before Trial or before Cause Submitted. The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended, by adding the name of a party, or other allegation material to the cause; and in like manner and for like reason, it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved.¹

¹ Cf. *Nassaney v. Culler*, 224 N.C. 323, 328, 30 S.E.2d 226 (1944): "Ordinarily, when an amendment is made containing substantially new and material allegations, the opposing party must be given an opportunity to 'meet the new allegations and prepare for trial,' and a continuance for such purpose has been regarded as a matter of right. *McIntosh*, N. C. Practice and Procedure, sec. 486. . . . But the principle expressed in the maxim *cessante ratione legis, cessa et ipsa lex* should, *a fortiori*, apply to a rule of procedure which is the product of the court. The facts set up in the amendment were well known to defendant, and an indefinite continuance would not have put him in a position to dispute them. He also had the parties concerned in the transaction present in court."

¹ For similar statutes, see Ark. Dig. Stat. § 1463 (1937); N. D. Rev. Code § 28-0737 (1943); Okl. Stat., tit. 12, § 317 (1941); S. C. Code Ann. § 494 (1942). Cal. Code Civ. Pro. Ann. § 473 (1946) is similar, except that it omits the last clause with respect to an amendment to conform a pleading to the proof and, in lieu thereof, provides: "The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars. . . . When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial . . ." For an example of statutes similar to the California statute, see Mont. Rev. Codes Ann. § 9187 (1935).

ASHER v. PITCHFORD

Supreme Court of Oregon, 1941. 167 Or. 70, 115 P.2d 337.

LUSK, JUSTICE. This is a proceeding by writ of review, under Ch. 2, Title 11, O. C. L. A. § 11-201 et seq., to review the decision of the district court for Multnomah County.

It appears from the return to the writ that the defendant, Clara Pitchford, as plaintiff in the district court, sued the petitioner in the writ, George Asher, to recover the sum of \$250, with interest, which the complaint alleged "plaintiff loaned to the defendant, for his accommodation and at his request and upon his express promise of repayment." The defendant in that case answered, denying generally the allegations of the complaint and alleging a counter-claim which is not now material. On the trial, after all the evidence had been introduced and at the conclusion of the argument of counsel for defendant, the court instructed plaintiff's counsel to file an amended complaint setting forth a cause of action for money had and received, and thereafter, over the objection of counsel for the defendant, an amended complaint was filed reading as follows:

"I.

"That during the month of January, 1938, Perry Pitchford was the owner of a pool hall business at 8207 North Denver Avenue in the City of Portland, Oregon, and operated and conducted the same under the assumed name of 'Perry's Pastime,' and the plaintiff was the wife of said Perry Pitchford and derived her livelihood from the income of said business.

"II.

"That on the 3d day of January, 1938, defendant had and received of and from the plaintiff, and for and to plaintiff's use and benefit, Two Hundred and Fifty Dollars, in manner as follows: That on said third day of January, 1938, the said money was delivered to, and received by defendant for the sole and special purpose of enabling defendant while assisting plaintiff's husband in the operation of his said pool hall business to cash checks for his patrons; which purpose had been fully carried out and completed prior to the commencement of this action, to-wit, on or about March 14, 1938, on which date defendant and his wife acquired the ownership of said pool hall, plaintiff's husband having died in the meantime.

"III.

"That on or about the 4th of June, 1938, through her attorney plaintiff demanded repayment of said sum of Two Hundred and Fifty Dollars, but defendant has failed, refused and neglected to repay or return said money or any part thereof to plaintiff." (Prayer omitted).

The defendant thereafter moved to strike the amended complaint from the files. This motion was denied in an order which recited that the court had allowed the complaint to be amended "so as to conform the same to the facts proved upon the trial", and judgment was thereupon entered in favor of the plaintiff as prayed for in the amended complaint. The judgment order contains a similar recital as to the reason for allowance of the amendment. . . .

We are brought then to the merits of the question . . . , namely, whether the district court erroneously exercised its judicial functions in allowing the plaintiff in the case before it to file the amended complaint. . . .

The petitioner contends that the amended complaint states a cause of action substantially different from the original complaint, and that the order allowing it to be filed therefore contravenes the provision of 1 O. C. L. A. § 1-1006, that the court may "at any time before the cause is submitted, allow such pleading . . . to be amended . . . when the amendment does not substantially change the cause of action or defense". Whatever the decision of this question would have been in the earlier judicial history of this state, it is clear that under recent decisions, and especially *East Side Mill & Lumber Co. v. Southeast Portland Lumber Co.*, 155 Or. 367, 64 P.2d 625, and *Elliott v. Mosgrove*, 162 Or. 507, 91 P. 2d 852, 93 P. 2d 1070, the contention cannot be sustained.

In the former case the original complaint stated a cause of action for services performed for, and goods and money furnished to, the defendant. An amended complaint was filed in which recovery was sought for the same services, goods and money, but upon the theory of mutual, open and current accounts between the parties. In the latter case the complaint alleged that a trustee had collected a promissory note belonging to the trust estate and failed to account for the proceeds; by an amendment made upon the trial the complaint was changed so as to charge that either the collection had been made or could have been accomplished through the exercise of reasonable diligence. In each case it was held that the identity of the cause of action had not been destroyed by the amendments. The opinions review and

discuss the modern authorities at length, and nothing is to be gained by going over that ground again.

Under these decisions and the conception of "cause of action" which they announce, the cause of action here consisted of the right of the plaintiff to receive from the defendant the sum of \$250 which the former had delivered to the latter under an express or implied agreement for its repayment, and the invasion of that right by the defendant's refusal to pay the money on demand. See Phillip's Code Pleading, § 30. In the original complaint it was alleged that the defendant loaned the money to the plaintiff. The proof, as we must assume from the district court's order so reciting (1 O. C. L. A. § 1-1006; *Barr v. Woodbury*, 136 Or. 647, 651, 300 P. 497), showed that the money, instead of being a loan in the strict sense of that word, was delivered to the defendant to be used for a certain purpose, and that the purpose had been fulfilled, thereby creating an implied obligation for the return of the money to the plaintiff. It must also be assumed, because the record contains nothing to the contrary, that the evidence of these facts was introduced on the trial without objection by the defendant, and that the defendant was not taken unawares by the nature of the testimony. In these circumstances the court ordered the amendment to be made so as to conform the pleading to the proven facts, instead of giving judgment against the plaintiff because the proof did not precisely support the allegations of the complaint. Under the amendment as under the original complaint, the question still related to the same sum of \$250 delivered by the plaintiff to the defendant; and the court was right in not turning the plaintiff out of court because of his failure to use the most appropriate language in pleading his case or to observe the niceties of distinction between the common counts for money lent and money had and received. See 41 C. J., *Money Lent*, 2, § 1; *Murphy v. Dalton*, 139 Mich. 79, 102 N. W. 277.

In our opinion the amendment did not destroy the identity of the cause of action or substantially change it, and the district court did not erroneously exercise its judicial functions by its allowance. . . .

The judgment of the circuit court [which had in the first instance reviewed the decision of the district court and from whose order defendant had appealed] is therefore reversed [on other grounds] and the cause remanded, with directions to enter . . . a judgment [affirming the decision of the district court].¹

¹ Cf. *Nassaney v. Culler*, 224 N.C. 323, 30 S.E.2d 226 (1944); *Vaillancourt v. Dutton*, 115 Vt. 36, 50 A.2d 762 (1947); *Treptau v. Behrens Spa, Inc.*, 247 Wis.

NOTE

Kentucky Home Mutual Life Insurance Co. v. Watts, 298 Ky. 471, 479-480, 183 S. W. 2d 499 (1944): Action upon a policy of life insurance which provided for double indemnity in the event of accidental death. Defendant contended and on the trial introduced evidence to prove that the insured committed suicide. "On the trial of the case, appellee testified that the insured had been suffering from a double hernia since birth. Appellant had not received this information previous to the trial. Accordingly, its attorneys prepared an amended answer, alleging that at the time of applying for the insurance the insured was ruptured, and that in the application he answered the question in respect to the existence of a rupture in the negative. The amendment further alleged that the answer was false, fraudulent, material to the risk, and the policy would not have been issued had appellant had knowledge of the true facts. The motion to be permitted to file the answer was supported by an affidavit of one of the attorneys, which showed that appellant did not have such information previous to the trial. The Court refused to permit the amendment to be filed. Section 134 of the Civil Code of Practice provides that the Court, in furtherance of justice, may at any time permit a pleading to be amended, by conforming the pleading to the facts proved, if the amendment does not change substantially the claim or defense. Section 136 of the Code provides that, if a party amend a pleading, and the Court shall be satisfied that the adverse party cannot be ready for trial in consequence of the amendment, a continuance may be granted to enable the adverse party to prepare for the issue presented by the amended pleading. The amendment offered by appellant materially changed the defense; but the facts relied on in support of the amendment were not known to appellant until after the trial commenced. Section 134, especially when read in connection with Section 136, does not preclude the right of a party to a suit to amend his pleading upon discovery of facts theretofore unknown, simply because the amendment offered changes the defense or the cause of action. Where the defense is not changed by the amendment offered, it may be filed without necessitating the continuance of the action; but where the amendment offered materially changes the defense or the cause of action, the adverse party shall be entitled to a continuance of the case, as a matter of right. In Board of Education of City of Ludlow v. Ritchie, 149 Ky. 674, 149 S. W. 985, an amendment was offered at the end of the preparation of the case which completely changed the defense. The Trial Court refused to permit the amendment to be filed; and this Court reversed the case holding such refusal to be error. And so, we now hold that it was error of the Court to overrule appellant's motion to be permitted to file the amended answer tendered. On return of the case, the Court will permit the amendment to be filed."

438, 20 N.W.2d 108 (1945); *Terpstra v. Schinkel*, 235 Iowa 547, 17 N.W.2d 106 (1944).

ROSS v. ROBINSON

Supreme Court of Oregon, 1944. 174 Or. 25, 147 P.2d 204.

LUSK, JUSTICE. The question for decision is whether the plaintiff's action is barred by the statute of limitations. The action is for death by wrongful act, and the right to bring it is conferred by § 8-903, O. C. L. A., which reads as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

On December 23, 1939, the plaintiff Frank P. Ross, as administrator of the estate of Lyna M. Ross, deceased, filed a complaint alleging that Lyna M. Ross came to her death on December 14, 1939, as the result of certain specified negligent acts of the defendant Everett E. Robinson in the operation of an automobile, and that the estate of Lyna M. Ross, deceased, had thereby been damaged in the sum of \$10,000, for which judgment was prayed. A jury trial resulted in a judgment for the plaintiff. On appeal to this court the judgment was reversed. We held that the complaint, which was challenged by demurrer, did not state facts sufficient to constitute a cause of action, for the reason that it failed to negative the existence, at the time of the decedent's death, of the preferred beneficiaries named in the statute namely, a widower and surviving dependents: *Ross v. Robinson*, 169 Or. 293, 318, 124 P. 2d 918, 128 P. 2d 956. The cause was remanded to the circuit court with directions to sustain the demurrer to the complaint and for further proceedings not inconsistent with the opinion of this court.

Thereafter, on January 4, 1943, the plaintiff filed an amended complaint, which is, in substance, the same as the original complaint except that it alleges that "plaintiff Frank P. Ross is the surviving widower of the said Lyna M. Ross, deceased, and that she left no other dependents, and by reason of the death of said Lyna M. Ross, the said Frank P. Ross was and is damaged in the sum of Ten Thousand (\$10,000.00) Dollars." Judgment for the benefit of Frank P. Ross was prayed for accordingly.

The defendant demurred to the amended complaint on the ground that the action was barred by the provision of § 8-903, O. C. L. A., that the action shall be commenced within two years after the death. The court sustained the demurrer and entered judgment for the defendant. The plaintiff has appealed.

It is the defendant's position, and was evidently that of the trial judge, that the cause of action stated in the amended complaint, instead of being a mere continuance of that stated in the original complaint, is in fact a wholly new and different cause of action, asserted on behalf of a different beneficiary and governed in certain particulars by different rules of law, and that, since this new action was not filed within two years after the death of Lyna M. Ross, the plaintiff has not brought himself within the limitation of the statute and the action must fail.

The defendant relies on *Fox v. Ungar*, 164 Or. 226, 98 P.2d 717. The plaintiff in that case, Helen Fox, commenced an action as administratrix of the estate of her deceased son to recover damages for his death, under § 5-703, Oregon Code 1930 (which is the same as § 8-903, O. C. L. A., except for an amendment made in 1939, Laws 1939, c. 466). More than two years after her son's death, Helen Fox, in her individual capacity, filed an amended complaint bringing the case under the Employer's Liability Act. O. C. L. A. § 102-1601 et seq. We held that this was not the same cause of action as that stated in the original complaint and did not relate back to the time of its filing, but was barred by the statute of limitations. It was pointed out that the two complaints were brought under different statutes; that the recovery in the one case was for the benefit of the estate and subject to the debts of creditors, in the other for the benefit of the persons named as beneficiaries in the statute; that if the decedent's death resulted from violation of the Employers' Liability Act there was no authority in law for his personal representative to bring the action; that the two actions were concerned with the violation of different duties owed by the defendant to the decedent; and that in the first action the negligence of a fellow servant and contributory negligence of the decedent would be defenses, while in the second neither of these defenses would be available. The court concluded:

"Although the statute, under applicable facts, authorizes the bringing of these actions, the rights and remedies of the parties in the two actions are not the same, each cause of action being dependent upon a different state of facts". 164 Or. 231, 98 P.2d 719.

In some important respects the two cases are alike. Here, as in *Fox v. Ungar*, the persons on whose behalf recovery is sought

in the two complaints are different, as is the measure of damages (*Nordlund v. Lewis & Clark Railroad Co.*, 141 Or. 83, 92-97, 15 P.2d 980; *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450, 459, 28 P. 497); and contributory negligence, which would not have been available as a defense to the original complaint is available under the amended complaint, because it alleges that Frank P. Ross, for whose benefit the action is brought, was himself driving the automobile in which his wife was riding at the time of the collision which resulted in her death. 87 A. L. R. 590. But in both pleadings in the instant case there is the same plaintiff, namely, the administrator, who is the only person authorized to bring the action, and the statute under which it is brought is the same and the identical violation of duty is charged.

It is a general rule that "an amendment of a pleading will take effect by relation and thus relieve against the bar of an intervening limitation if the identity of the cause of action is still substantially the same, but that the limitation will prevail if under the guise of an amendment there is the substitution of a new cause of action in place of another wholly different." *United States v. Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 53 S. Ct. 278, 280, 77 L. Ed. 619, quoted in *Ibach v. Jackson*, 148 Or. 92, 101, 35 P. 2d 672.

In the application of this rule, as of many other general principles of law, courts have differed. The conflicting results which have been reached in cases presenting similar facts seem to be influenced largely by the particular court's conception of the meaning of the term, "cause of action", and to some extent, perhaps, by a rigid and technical attitude on the one hand, or a liberal disposition on the other, towards the exercise of the right of amendment by a party desirous of staying in court and having a trial on the merits, as against the effort of his opponent to turn him out of court with a plea of the statute of limitations.¹ . . .

Familiar tests sometimes resorted to for determining whether there has been a change in the cause of action are: That recovery upon the original complaint would have barred recovery upon the amended pleading; that the measure of recovery is the same in each case; that substantially the same evidence would support both pleadings; and that the allegations of each are subject to the same defenses: 37 C. J., *Limitations of Actions* 1076, § 512. See *East Side Mill & Lumber Co. v. Southeast Portland Lumber Co.*, 155 Or. 367, 377, 64 P. 2d 625. If all these tests

¹ The court's discussion of *Hooper v. Atlanta, K. & N. Ry. Co.*, 92 F. 820 (C.C.A. 6th 1899), and *S. C.*, 107 Tenn. 712, 65 S.W. 405 (1901), which, according to the court, bring "this divergence of view . . . into sharp focus," is omitted.

must be met it is clear that the defendant in this case must prevail.

"A departure from law to law", the court said in *United States v. Memphis Cotton Oil Co.*, supra, "has at times been offered as a test" of change in the cause of action. *Hall v. Louisville & N. R. Co.*, C. C. 1907, 157 F. 464, illustrates the application of this test. But, as the Supreme Court said in the *Memphis Cotton Oil Company* case, "later decisions have made it clear that this test is no longer accepted as one of general validity." [Citations omitted.] This court likewise has refused to be governed by that test, for, in *East Side Mill & Lumber Co. v. Southeast Portland Lumber Co.*, supra, it was held that an amendment changing the plaintiff's claim from one for services performed and goods furnished to the defendant to a claim based upon mutual, open and current accounts between the parties, was not the substitution of a new and different cause of action so as to let in the defense of limitations. See, also, *Asher v. Pitchford*, 167 Or. 70, 77, 115 P. 2d 337. In the *East Side Mill & Lumber Co.* case the court relied upon the decisions of the Supreme Court of the United States hereinabove cited, as well as upon *Richardson v. Investment Co.*, 124 Or. 569, 264 P. 458, 265 P. 1117, in which it was held that the plaintiff did not introduce a new cause of action in changing from a complaint upon express contract to one upon quantum meruit. But *Fox v. Ungar* gives as one of the reasons for the decision that the original and amended complaints charge violations of duty arising under different laws, notwithstanding they both sought recovery of damages for the same death.

There are a few cases which hold that an amendment changing the capacity in which the plaintiff sues, as, for example, from that of an administrator to his individual capacity, is effective to change substantially the cause of action and let in the defense of limitations. But, as the annotation in 74 A. L. R. beginning at page 1269 shows, in the great majority of jurisdictions the courts say that such a change is in form rather than substance. See *Missouri, K. & T. Ry. Co. v. Wulf* [226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355 (1913)]; *Quaker City Cab Co. v. Fixter*, 3 Cir., 1925, 4 F. 2d 327; 16 Am. Jur., Death, 203, § 291. With the latter view we are in accord.

In the case at bar the argument most vigorously pressed by counsel for the defendant is that an amendment changing the beneficiary and, therefore, the amount of the recovery, is, in effect, the commencement of a new action. . . .²

² The court's citation of the authorities relied upon by defendant and its discussion of one of them, *Hall v. Louisville & N. R. Co.*, 157 F. 464, are omitted.

. . . It is enough to say that there is authority for the defendant's contention, and also, as will presently be shown, there is authority against it; and that, for reasons which will be stated, we have reached the conclusion that to hold that the amendment here in question was equivalent to the commencement of a new action, which is now barred by the statute of limitations, would be contrary to what we believe is the more enlightened modern judicial view of the subject. The principal function of pleadings is to enable litigants to bring their controversies to trial on the merits, and, generally speaking, the rules concerning pleadings should not be permitted to defeat a party's right to a trial except when to do otherwise would be unjust to his adversary or violate some express command of the statute. . . .

"Statutes of limitation . . . 'are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected.'" Weber v. Board of Harbor Commissioners, 1873, 18 Wall. 57, 70, 85 U. S. 57, 21 L. Ed. 798; 34 Am. Jur., Limitation of Actions 18, § 9. It is only in a highly technical sense and one that has nothing to do with the fundamental rights of the parties that the claim here sued upon can be said to be "allowed to remain neglected". The action was commenced December 23, 1939, nine days after the accident in which Mrs. Ross was killed, and ever since has been pressed in the courts. The plaintiff, as administrator, is the only person authorized by the statute to prosecute the action, and the wrongful acts, which, it is alleged, caused the death of the deceased, have remained unchanged in the statement of the plaintiff's claim from the beginning. It is true that he made a mistake. He thought that the estate, instead of himself individually, was entitled to the damages, and so alleged. Under the law as it stood until June 14, 1939, he would have been right, as formerly the only action that could be maintained was on behalf of the estate of the deceased, and it may fairly be assumed that he erred because neither he nor his counsel knew of the amendment of the death statute effected by Ch. 466, Oregon Laws 1939.

With respect to a comparable situation, it was said by one of America's most illustrious judges:

"Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that *the plaintiff sets up and is trying to enforce a claim against it because of specified conduct*, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied." (Italics supplied) Mr. Justice Holmes in New York C. & H. R. R. Co. v. Kinney, [260 U. S. 340, 43 S. Ct. 123, 67 L. Ed. 294.]

Again Mr. Justice Holmes wrote:

"The cause of action arose under a different law by the amendment, *but the facts constituting the tort were the same*, whichever law gave them that effect, and the court was warranted in thinking that on the matter of dependency there was no surprise." (Italics supplied) *Seaboard Air Line Ry. Co. v. Koennecke*, [239 U. S. 352, 36 S. Ct. 127, 60 L. Ed. 324].

The case of *Neubeck v. Lynch*, 1911, 37 App. D. C. 576, 37 L. R. A., N. S., 813, cited by the defendant, is in point. . . .³

Referring to *Neubeck v. Lynch*, supra, counsel for defendant say in their brief that this case "indicates how dangerous it is to rely, to any great extent, for guidance, in our question, upon the decisions from other States" and that "the Federal rules of procedure as to amendment of pleadings . . . are, as shown by the quotations in the *Neubeck* case, very different from the Oregon Statute concerning amendments." It is further sought to distinguish that case on the ground that the amendment was made before trial, while here, it is argued, the amendment did not come until after trial. But that is a mistaken assumption, for it is settled in this state that, after a reversal on appeal, whenever this court does not make a final disposition of the case but remands it for further proceedings, the trial court has the same power and authority to allow a pleading to be amended as it would have had if there had been no previous trial.⁴ *Lieuallen v. Mosgrove*, 37 Or. 446, 447, 61 P. 1022; *Richardson v. Investment Co.*, supra; *York v. Nash*, 42 Or. 321, 71 P. 59. An amendment in those circumstances is treated as having been made before trial. And it may be seriously questioned whether the federal rules of procedure set out in the *Neubeck* case are any more liberal with respect to the allowance of amendments before trial than the provisions of our statute, § 1-1006, O. C. L. A. The construction given to that statute by Mr. Justice Robert S. Bean, speaking for the court in *Talbot v. Garretson*, 31 Or. 256, 265, 49 P. 978, 980, has never been departed from. With reference to the right of amendment before trial, he said:

"A plaintiff cannot, of course, abandon his original cause of action or suit, and substitute an entirely new and different one, because in such case the new pleading would not be an amendment, but a substitution for the original. But so long as the amendment is germane to the subject-matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in the further-

³ The court's discussion of this and other cases is omitted.

⁴ Cf. *Anderson v. Beidleman*, 198 Okl. 324, 178 P.2d 81 (1947); *Waddell v. Woods*, 160 Kan. 481, 163 P.2d 348 (1945).

ance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defense." [Citations omitted.]

The conclusion which we have reached follows as a logical consequence from our adoption of the view put forth in *Clark on Code Pleading*, p. 503, and approved by the Supreme Court of the United States in the opinion of Mr. Justice Cardozo in *United States v. Memphis Cotton Oil Co.*, *supra*, that the term, "cause of action", does not always and in all circumstances have the same meaning, and that in the context of a case like this it is to be taken "as a group of operative facts giving rise to one or more rights of action": *Elliott v. Mosgrove*, 162 Or. 507, 544-552, 91 P. 2d 852, 93 P. 2d 1070. See, also, *East Side Mill & Lumber Co. v. Southeast Portland Lumber Co.*, 155 Or. 367, 374, 64 P. 2d 625; *Asher v. Pitchford*, 167 Or. 70, 77, 115 P. 2d 337. Under that conception the cause of action for the purposes of the question here to be decided consists in a claim against the defendant "because of specified conduct" which the "defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce": *New York C. & H. R. R. Co. v. Kinney*, *supra*. The identity of the cause of action, therefore, remains substantially unchanged, and the defense of the statute of limitations is not available. In so holding no injustice is done the defendant, who is merely required to meet the claim of his adversary on the merits.

The contention that the original complaint was a nullity and, therefore, that there was nothing to amend is, in our opinion, not sound.⁵ That pleading showed that a wrong had been committed by the defendant for which the plaintiff was entitled to recover on behalf of one of the beneficiaries named in the statute. The answer alleged, and the reply admitted, that Frank P. Ross was the surviving husband of the deceased, and, if the doctrine of *aider* by a plea be applicable, it then appeared that it

⁵ *Cf. Waddell v. Woods*, *supra* note 4, at 486-487: "By reason of the foregoing we think it clearly appears that our opinion in this case on its former appeal must be construed as holding that the involved petition did not allege sufficiently a cause of action based on either the theory of *res ipsa loquitur* or common law of negligence. Consequently, since no cause of action whatever was pleaded in the prior petition, none existed which could be amended. It is true, of course, that ordinarily an amended petition can be filed within the statutory period even if previously-filed petitions have not alleged a cause of action, but unless some petition is filed within the period provided by the statute which alleges sufficiently a cause of action, then any amendment thereof arrives too late. There is nothing new or novel about the rule which we think is controlling in the present case. Syllabus two in the case of *Railway Co. v. Bagley*, 65 Kan. 188, 69 P. 189, 3 L.R.A., N.S., 259, contains a concise statement of the rule. It reads as follows: 'Where the original petition states no cause of action whatever, it will not arrest the running of the statute of limitations, and an amendment made after the bar of the statute is complete must be treated as filed at the time the amendment is made. A cause of action, being stated then for the first time, cannot escape the bar of the statute of limitations by being filed as an amendment.'"

was the husband and not the estate, on behalf of which the action was brought, to whom the damages would inure. In either case it was a defective statement of a good cause of action: *Neubeck v. Lynch*, supra; *Motsenbocker v. Shawnee Gas & Electric Co.* [49 Okl. 304, 152 P. 82, L. R. A. 1916B, 910 (1915)]. Our decision that the complaint, having been demurred to, was not sufficient to support the judgment, does not mean that it was a nullity. By remanding the case for further proceedings we indicated our opinion that the complaint had substance; otherwise we would have directed that judgment be entered for the defendant. The purpose of statutes authorizing amendments is to enable litigants to cure defective pleadings. The very section of *Corpus Juris*, 17 C. J., Death 1298, § 157, which counsel cite for the rule that where the original pleading states no cause of action it cannot be amended also says:

"Failure to allege the existence of beneficiaries, for whose benefit the action is brought, may be cured by amendment, unless there is no evidence to support the proposed amendment; and it has been held that such an amendment may be made after the expiration of the statute of limitations, but there is authority to the contrary." 17 C. J. 1299; 25 C. J. S., Death, § 77.

. . . .⁶

Numerous authorities are cited in the briefs of counsel for the defendant, which we have examined but have thought it unnecessary to refer to specifically, because our chief concern has been with the principles affecting the administration of justice which underlie the conflicting judicial views upon this subject. Our opinion in *Fox v. Ungar*, supra, written by Mr. Chief Justice Rand and concurred in by three other members of the court, including the writer of this opinion, clearly and forcefully states the argument for the restrictive doctrine there announced. The present case was heard by the full court, with the exception of Mr. Justice Belt, and, after a careful re-examination of the question, we are all of the opinion that, for the reasons herein given, *Fox v. Ungar*, in so far as it is inconsistent with this decision, should be deemed overruled.

The judgment is reversed and the cause remanded to the Circuit Court with directions to overrule the demurrer to the amended complaint, and for further proceedings in conformity to this opinion.

NOTE

Coral Gables, Inc., v. Palmetto Brick Co., 183 S. C. 478, 191 S. E. 337 (1937): Plaintiff brought an action against Palmetto

⁶ The court's discussion of certain Oregon cases and statutes is omitted.

Brick Co. and Thomason upon a promissory note which, it was alleged, they executed and delivered to plaintiff. However, it appeared from the note itself, which was set forth in the complaint, that it was signed "Palmetto Brick Co., By M. C. Thomason." Subsequently plaintiff moved for leave to amend its complaint so as to state a cause of action against Palmetto on the note and another against Thomason for fraudulently representing to plaintiff, when he signed the note on behalf of Palmetto, that he was authorized to do so. The circuit judge denied the motion on the ground that the proposed amendment would set up an entirely new cause of action against Thomason, "which cannot be done, after the statute of limitations has run" against the note. *Held*, it was erroneous to deny the motion. While the proposed amendment would set up a wholly new cause of action against Thomason, "under our decisions, this now appears to be allowable." The power given the court by statute⁷ to allow amendments to correct a mistake is limited only by the condition that it be in the interest of justice and that just terms be imposed. "This power is conditioned on proof of a bona fide mistake in setting forth the plaintiff's rights and the defendant's invasion of them. Unless the amendment proposed relates to the same transaction or the same subject as the original complaint, then it is manifest the plaintiff cannot claim to have made a mistake in the matter to which his pleading relates. When, however, the plaintiff makes the mistake of supposing one of his rights has been invaded by the defendant in one transaction, or series of transactions relating to the same subject, and discovers another and different right was in fact invaded, it is within the power of the court when it appears to be in furtherance of justice, to grant the amendment, though in strictness the amendment amounts to a change of the cause of action, or the insertion of another cause of action. The limitation of the power of amendment to conform the pleadings to the facts proved that the amendment shall not change substantially the claim or defense," is not applicable to amendments before trial.

⁷ S. C. Code 1942, § 494: "The court may, before or after judgment, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." *Cf. Hall v. Woodward*, 30 S.C. 564, 574-575, 9 S.E. 684 (1889), where, with respect to the last clause of this statute, the court said: "[T]his limitation [that the claim or defense shall not be substantially changed by amendment] applies only to cases where an amendment is applied for during or after trial. . . . The reason for the distinction is manifest; for where a party has come prepared to meet a certain claim or defence, it would be clearly unjust to permit such claim or defence to be changed substantially in the midst of the trial, or after it was concluded, though there would be no injustice in permitting an amendment which made no substantial change in the claim or defence, but simply supplied some formal matter, which did not go to the merits of the issue which has been, or is being, tried. But this would not apply to an amendment made *before trial*; for there the amendment can operate no surprise, as the other party, if he moves for it, can always obtain time to answer such amendment."

NEW YORK CIVIL PRACTICE ACT

§ 434. Variance between Pleading and Proof. A variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance within this section, but a failure of proof.

NEW YORK RULES OF CIVIL PRACTICE

Rule 163. Defects in Pleadings; Variance; Failure of Proof.
1. If a pleading be defective, whether for failure to state a cause of action, or a defense, or otherwise, and objection thereto has not been raised before the trial, the judge may permit it to be amended. If evidence be offered which is relevant to the controversy between the parties, but which is not admissible because the facts to the proof of which it is addressed are not sufficiently pleaded, or in case of variance between pleading and proof, the judge may permit an amendment conforming the pleadings to the proof. In granting any amendment hereinbefore provided for, the judge may adjourn the trial or direct a new trial, and impose terms and conditions in his discretion.

2. A complaint or counterclaim need not be dismissed on the trial because of failure of or defect in proof, if it shall be made to appear that the evidence to supply the defect can be produced. In such case the judge may thereupon receive such evidence or adjourn the trial, or direct a new trial on such terms as in his discretion shall be proper.

HARRISS v. TAMS

Court of Appeals of New York, 1932. 258 N.Y. 229, 179 N.E. 476.

LEHMAN, J. The defendants acting as brokers negotiated the sale to the plaintiff of a motor boat belonging to one Richards for the price of \$18,000. The evidence supports findings of the trial judge that the defendants represented to the plaintiff that the motor boat would be in first class condition and repair when delivered to the plaintiff, and that it was capable of making a speed of twenty-eight miles an hour. The motor boat was never

Brick Co. and Thomason upon a promissory note which, it was alleged, they executed and delivered to plaintiff. However, it appeared from the note itself, which was set forth in the complaint, that it was signed "Palmetto Brick Co., By M. C. Thomason." Subsequently plaintiff moved for leave to amend its complaint so as to state a cause of action against Palmetto on the note and another against Thomason for fraudulently representing to plaintiff, when he signed the note on behalf of Palmetto, that he was authorized to do so. The circuit judge denied the motion on the ground that the proposed amendment would set up an entirely new cause of action against Thomason, "which cannot be done, after the statute of limitations has run" against the note. *Held*, it was erroneous to deny the motion. While the proposed amendment would set up a wholly new cause of action against Thomason, "under our decisions, this now appears to be allowable." The power given the court by statute⁷ to allow amendments to correct a mistake is limited only by the condition that it be in the interest of justice and that just terms be imposed. "This power is conditioned on proof of a bona fide mistake in setting forth the plaintiff's rights and the defendant's invasion of them. Unless the amendment proposed relates to the same transaction or the same subject as the original complaint, then it is manifest the plaintiff cannot claim to have made a mistake in the matter to which his pleading relates. When, however, the plaintiff makes the mistake of supposing one of his rights has been invaded by the defendant in one transaction, or series of transactions relating to the same subject, and discovers another and different right was in fact invaded, it is within the power of the court when it appears to be in furtherance of justice, to grant the amendment, though in strictness the amendment amounts to a change of the cause of action, or the insertion of another cause of action. The limitation of the power of amendment to conform the pleadings to the facts proved that the amendment shall not change substantially the claim or defense," is not applicable to amendments before trial.

⁷ S. C. Code 1942, § 494: "The court may, before or after judgment, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Cf. *Hall v. Woodward*, 30 S.C. 564, 574-575, 9 S.E. 684 (1889), where, with respect to the last clause of this statute, the court said: "[T]his limitation [that the claim or defense shall not be substantially changed by amendment] applies only to cases where an amendment is applied for during or after trial. . . . The reason for the distinction is manifest; for where a party has come prepared to meet a certain claim or defence, it would be clearly unjust to permit such claim or defence to be changed substantially in the midst of the trial, or after it was concluded, though there would be no injustice in permitting an amendment which made no substantial change in the claim or defence, but simply supplied some formal matter, which did not go to the merits of the issue which has been, or is being, tried. But this would not apply to an amendment made *before trial*; for there the amendment can operate no surprise, as the other party, if he moves for it, can always obtain time to answer such amendment."

NEW YORK CIVIL PRACTICE ACT

§ 434. Variance between Pleading and Proof. A variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance within this section, but a failure of proof.

NEW YORK RULES OF CIVIL PRACTICE

Rule 163. Defects in Pleadings; Variance; Failure of Proof.

1. If a pleading be defective, whether for failure to state a cause of action, or a defense, or otherwise, and objection thereto has not been raised before the trial, the judge may permit it to be amended. If evidence be offered which is relevant to the controversy between the parties, but which is not admissible because the facts to the proof of which it is addressed are not sufficiently pleaded, or in case of variance between pleading and proof, the judge may permit an amendment conforming the pleadings to the proof. In granting any amendment hereinbefore provided for, the judge may adjourn the trial or direct a new trial, and impose terms and conditions in his discretion.

2. A complaint or counterclaim need not be dismissed on the trial because of failure of or defect in proof, if it shall be made to appear that the evidence to supply the defect can be produced. In such case the judge may thereupon receive such evidence or adjourn the trial, or direct a new trial on such terms as in his discretion shall be proper.

HARRISS v. TAMS

Court of Appeals of New York, 1932. 258 N.Y. 229, 179 N.E. 476.

LEHMAN, J. The defendants acting as brokers negotiated the sale to the plaintiff of a motor boat belonging to one Richards for the price of \$18,000. The evidence supports findings of the trial judge that the defendants represented to the plaintiff that the motor boat would be in first class condition and repair when delivered to the plaintiff, and that it was capable of making a speed of twenty-eight miles an hour. The motor boat was never

capable of making such a speed, and the owner testified that the defendants were not authorized to represent that it was capable of making such a speed or that its engine would be put in a condition which would make the boat capable of such speed. The trial judge further found that the boat was never delivered to or accepted by the plaintiff and that the plaintiff is entitled to recover from the defendants the purchase price he paid to the owner, in advance of delivery, with interest from May 1st, 1919, the date of such payment. . . .

So far we have treated the action as one for breach of the defendant's warranty of authority to make representations on behalf of his principal. In truth, the complaint served on the defendants alleges no such cause of action. The complaint alleges that the defendants were engaged in "the business of buying and selling yachts and ships as principals and agents." That the defendants made certain representations "for the purpose of inducing the plaintiff to purchase a certain motor yacht or boat known as the *Get There* belonging to one Fred L. Richards." Nowhere is there any allegation that the defendants in making these representations acted in behalf of the owner of the boat or impliedly asserted that they had authority from him to sell the boat or to make representations binding upon him. The complaint does not even allege a purchase of the boat from the owner. On the contrary, the complaint alleges that "thereupon the plaintiff and the *defendants duly entered into a contract whereby the defendants duly agreed to deliver* the motor yacht in accordance with the representations hereinabove set forth for the sum of eighteen thousand dollars, said moneys to be paid either to the defendants or the said Fred L. Richards as the defendants should elect, and the defendants then and there duly agreed that if said motor boat did not accord with the representations so made as aforesaid, that the defendants would return the Eighteen Thousand Dollars to the plaintiff." It is for breach of the alleged agreement, made by the defendants, to deliver a motor yacht in accordance with their own representations and warranties, or return the purchase price to the plaintiffs, that this action is brought.

The parties went to trial upon the issues raised by the answer to this complaint. At the opening, the plaintiff's counsel stated, in answer to a question by the trial judge, that the complaint set forth a cause of action against a broker upon a dual theory, "first, on an alleged promise to bind that broker individually" and, secondly, that "the representations and agreements made by that broker were not authorized by the principal." Counsel for the defendants did not acquiesce in this statement.

nor did the court rule upon it at that time. Throughout the trial, counsel for the defendants assumed the attitude, in which the court acquiesced, that recovery could be had only in accordance with the allegations of the complaint, unless a motion to amend the complaint was granted. During the trial some evidence was admitted that the owner of the boat had not authorized any warranty of speed, but as the pleadings then stood the defendants were not called upon to offer a defense to a cause of action which was not pleaded in the complaint. At the close of the trial the defendants were entitled to a dismissal of the cause of action alleged for breach of contract.

Then for the first time the plaintiff moved to amend the complaint to "conform to the proof." That motion was denied and the plaintiff thereupon moved to amend the complaint to allege a cause of action for breach of the brokers' implied warranty of authority to make the representations they did. The court reserved decision upon this motion but in its opinion granting judgment in favor of the plaintiff stated that plaintiff's motion to amend was granted. For the purposes of this appeal we will assume that a ruling made in the opinion effectively amended the complaint. The defendants urge that they cannot by such an amendment be deprived of their right to interpose as a defense the bar of the Statute of Limitations to a cause of action which concededly arose in 1919 and which was not pleaded till 1930.

. . .

The rule established in this State is that: "There is no doubt that the court may, at Special Term, allow an amendment of a complaint by introducing therein even a cause of action barred by the Statute of Limitations. But in such case the defendant must not be deprived of his defense of the statute." (*Davis v. N. Y., Lake Erie & Western R. R. Co.*, 110 N. Y. 646, 647, 17 N. E. 733.) The same rule is generally followed throughout the United States (*Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 L. Ed. 983, and cases there cited), at least where the courts have been given plenary power to permit an amendment. The Statute of Limitations provides that "an action upon a contract obligation or liability express or implied" must be commenced within six years after the cause of action accrued (Civ. Prac. Act, § 48). Until the complaint is served in an action, perhaps even until the time has elapsed during which the complaint may be amended as of right, it may be impossible to determine definitely upon what obligation or liability the action is brought. After that time the nature of the action is definitely determined; it is brought upon the obligation or liability set forth in the complaint. Then the Statute of Limitations has ceased to run against

a cause of action founded upon that obligation or liability. It continues to run against all other causes of action. No doctrine that an amendment of the complaint relates back to the beginning of the action can change the fact that though the plaintiff may, with leave of the court, abandon the cause of action originally pleaded upon a specified obligation or liability and substitute a cause of action upon a different obligation or liability, yet until the substitution is made no action has been commenced or is pending upon the substituted cause of action. Upon that cause of action the statute has continued to run, and its bar may be interposed when by amendment to a complaint it is substituted for a cause of action brought upon another obligation.

It would serve no purpose to analyze the multifarious cases in different jurisdictions where the courts have been called upon to decide whether the Statute of Limitations constitutes a defense to a cause of action set forth in an amended complaint. Though they agree on the general principle that a defendant is not precluded from setting up the Statute of Limitations as a bar to a cause of action substituted by amendment to a complaint for another cause of action upon a different obligation or liability, it is difficult, perhaps impossible, to formulate from these decisions any test, universally applicable, of what constitutes a different obligation or liability. . . .

Here it is clear that, however liberal the rule, the amendment introduced a cause of action upon a different obligation or liability, and for different conduct from that specified in the original complaint. The original complaint, as we have shown, was for breach of a contract made by the defendants as principals to deliver a boat which would comply with representations made by them or to return the stipulated purchase price of the boat. Though the complaint alleges that the boat was owned by another party, the complaint contains no allegation, express or implied, that the defendants in making the representations acted as agents of the owner or that the plaintiff was induced to enter into a contract with the owner. The defendants from the beginning of the action had notice that the plaintiff claimed that the representations they made as principals were untrue, but an agent assumes no personal obligation and is subject to no liability if he, innocently, makes false representations in behalf of his principal. The defendants could meet the cause of action originally pleaded by proof that they had given no personal warranty and had made no personal representations and had entered into no personal contract with the plaintiff to return the money if the representations they are alleged to have made proved untrue. They had no notice until the trial that if the plaintiff

failed to sustain the allegations of the complaint he would try to enforce a different claim, negated, indeed, by the allegations of the complaint, that the defendants had throughout acted as agents and had given an implied warranty of their authority to act for their principal in all they did. Until an action is brought to enforce a claim upon the alleged obligation of the defendants incurred by making representations or giving a warranty in behalf of the principal without authority from him, the reasons for the Statute of Limitations exist and the statute by its terms continues to run. It may be interposed when a cause of action to enforce that obligation is pleaded either in a new or an amended complaint.

A different situation would be here if upon a new trial the plaintiff should be granted leave to amend his complaint to set up a cause of action against the defendants upon an obligation arising from a warranty that the boat would make a speed of twenty-eight miles an hour personally given by the defendants, in order to induce the plaintiff to purchase the boat. Perhaps the evidence would be sufficient to sustain a finding that the defendants assumed such obligation; perhaps the action might be said to have been brought originally to enforce that obligation, though the complaint served alleged the obligation imperfectly and asked a remedy for its breach by enforcement of an alleged promise to return the purchase price if the representations embodied in the warranty were untrue. We do not now attempt to pass upon possible questions which may arise upon a new trial. Now we decide only that the defendants have the right to interpose the bar of the Statute of Limitations to a cause of action upon an implied warranty of an agent's authority, and that the damages awarded for breach of that implied warranty are erroneous.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

CARDOZO, Ch. J., POUND, CRANE, KELLOGG, O'BRIEN and HUBBS, JJ., concur.

Judgments reversed, etc.¹

¹For recent cases dealing with the problem involved in the principal case, see *Martin v. Hall*, 297 Ky. 537, 180 S.W.2d 390 (1944); *Gurzo v. American Smelting & Refining Co.*, 132 N.J.L. 485, 41 A.2d 6 (1945).

WASHINGTON RULES OF PRACTICE

Rule 6.¹ Amendments and Irregularities

(1) The plaintiff, at any time before the service of the answer, may amend his complaint without leave of court.

(2) The court, upon motion, at any stage of an action, may order or give leave to either party to alter or amend any pleading, process, affidavit, or other document in the cause, to the end that the real matter in dispute, and all matters in the action in dispute, between the parties may be completely determined as far as possible in a single proceeding. But the order or leave shall be refused if it appears to the court (a) that the motion was made with intent to delay the action, or (b) that the motion was occasioned by lack of diligence on the part of the moving party and the granting of the motion would unduly delay the action or embarrass any other party, or (c) that, for any other reason, the granting of the motion would be unjust.

(3) Subject to the rules as to joinder of parties and of causes of action, an amendment to the complaint may introduce any new or different cause of action, or add new or different parties.

(4) A cause of action which would not have been barred by the statute of limitations if stated in the original complaint or counterclaim shall not be so barred if introduced by amendment at any later stage of the action, if the adverse party was fairly apprised of its nature by the original pleading, and that the plaintiff was claiming thereunder, provided no new party is added thereby.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings

¹ Wash. Rev. Stat. Ann. § 308-6 (Supp. 1945).

to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.¹

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.²

NOTE

Newman v. Zinn, 164 F. 2d 558 (C. C. A. 3d 1947): Action by husband and wife against a physician for personal injuries sustained by the wife. The complaint alleged that defendant did not use due and proper care and skill in performing a surgical operation on the wife. Defendant denied all allegations of negligence. At the end of plaintiffs' case the judge entered a nonsuit. On plaintiffs' appeal defendant contended that there was no evidence to support a verdict for plaintiffs, and that "plaintiffs' testimony tends to show, if anything, error in diagnosis rather than blunder in treatment. This, says the defendant, is not open to the plaintiff because the complaint alleged negligence in treatment. . . ." *Reversed*. "There are two answers to this contention." (i) "[D]iagnosis and treatment are not two separate areas with a boundary line between. The two go hand in hand. When they are together they are part of one problem involving the liability creating conduct with which the defendant is charged." (ii) "The second answer is that under [Federal Rule 15(b)] the plaintiff is not bound by the theory of his pleadings. He may offer his proof and conform his pleadings to the proof offered 'when the presentation of the merits of the action will be subserved thereby.' . . . We think the case one where, if it was deemed necessary to amend, the plaintiffs should have been permitted to do so with a right to the defendant for a continuance if the change in the direction of the development subjected him to unfair surprise. This the defendant did not do, but simply objected to the testimony not based upon the theory set out in the complaint. . . . We think he should have insisted on plaintiffs' amending if this objection was to be pressed. . . ."

¹ Cf. Clark, *Simplified Pleading*, 2 F.R.D. 456, 467-468 (1943): "Subdivision (b), dealing with amendments to conform to the evidence, is most important and well illustrates the subordinate character of the preliminary paper pleadings in advance of trial in the federal scheme. . . . This is a most useful rule, which is being intelligently applied in the federal system."

² Cf. Ill. Civ. Prac. Act § 46; S. D. Code Ann. § 33.0914 (1939); 7 U. of Chi. L. Rev. 733 (1940).

TILLER v. ATLANTIC COAST LINE RAILROAD CO.

Supreme Court of the United States, 1945. 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner's husband was killed while in the performance of his duties as an employee of respondent railroad. She filed suit under the Federal Employers Liability Act, 45 U. S. C. § 51 *et seq.*, alleging that her husband's death was caused by the negligent operation of a railroad car which struck and killed him, and because of respondent's failure to provide him a reasonably safe place to work. The District Court directed a verdict in favor of the railroad and the Circuit Court of Appeals affirmed. 128 F. 2d 420. We reversed, holding that there was sufficient evidence of the railroad's negligence to require submission of the case to the jury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 73, 63 S. Ct. 444, 87 L. Ed. 610. On remand, petitioner amended her complaint in the District Court, over respondent's objection, by charging that, in addition to the negligence previously alleged, the decedent's death was caused by the railroad's violation of the Federal Boiler Inspection Act, 45 U. S. C. § 22 *et seq.*, and Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of that Act. The jury returned a verdict in favor of petitioner, and the District Court refused to set it aside. The Circuit Court of Appeals reversed, 142 F. 2d 718, and certiorari was granted because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act and the Federal Boiler Inspection Act. . . .

Respondent seeks to support the Circuit Court's reversal of the cause on the ground that the District Court erroneously permitted petitioner to amend her original complaint. The injury occurred March 21, 1940. Suit was filed under the Federal Employers Liability Act on January 17, 1941. The amendment alleging violation of the Boiler Inspection Act was filed June 1, 1943, which was more than three years after the death. Federal Employers Liability Act, § 6, provides that a suit under that Act must be commenced within three years after injury. The contention is that the three-year limitation statute provided in the Federal Employers Liability Act barred the amendment which rested on the Boiler Inspection Act.

We are of the opinion that the amendment was properly permitted. Section 15 (c) of the Federal Rules of Civil Procedure provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or

occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The original complaint in this case alleged a failure to provide a proper lookout for deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, to warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. "The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant." *Maty v. Grasselli Co.*, 303 U. S. 197, 201. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.¹

We find no error in the District Court's disposition of the case. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

*Reversed.*²

THE CHIEF JUSTICE and MR. JUSTICE ROBERTS are of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

¹ See *Friederichsen v. Renard*, 247 U.S. 207, 38 S. Ct. 450, 62 L. Ed. 1075; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; *United States v. Powell*, 93 F.2d 788, 790. [Footnote by the Court.]

² Cf. *Glint Factors, Inc., v. Schnapp*, 126 F.2d 207 (C.C.A. 2d 1942); *Blair v. Durham*, 134 F.2d 729 (C.C.A. 6th 1943); *Michelsen v. Penney*, 135 F.2d 409 (C.C.A. 2d 1943); *Barthel v. Stamm*, 145 F. 2d 487 (C.C.A. 5th 1944); *Culver v. Bell & Loffland, Inc.*, 146 F.2d 29 (C.C.A. 9th 1945). In *Barthel v. Stamm* the court said [145 F.2d 490, 491]: "We recognize the rule as established in Georgia and elsewhere that a new and distinct 'cause of action' introduced by amendment cannot succeed if barred at the time of the amendment, but that a bettering or amplification of the case first sought to be alleged will relate back to the filing of the suit. The Rules of Civil Procedure have abandoned the term 'cause of action' and substituted 'claim', and they have abolished the old forms of action as separate measures of legal rights. A suit is now brought on a claim, stated in simple and untechnical language. The suit potentially involves the whole transaction which it identifies, and is intended to reach and settle the rights which arise out of the transaction. To this end, amendment is freely allowed. . . . Limitation is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it. When a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement. So long as the amendment is of the sort described in the above quoted Rule [15 (c)] it is within the scope of the original suit and a part of it."

SECTION 2. APPELLATE REVIEW OF DECISIONS OF ISSUES OF LAW

PROBLEMS

I. In which, if any, of the following situations might an appeal from the order sustaining or overruling the demurrer have served a useful purpose?

A. Demurrer to a complaint for failure to state a cause of action.

1. Demurrer *overruled*. Defendant pleads over, and after a trial of the issues of fact judgment is rendered
 - (1) for defendant
 - (2) for plaintiff.
2. Demurrer *sustained*. Plaintiff amends, and after a trial of the issues of fact judgment is rendered
 - (1) for plaintiff
 - (2) for defendant.

B. Demurrer to the answer as insufficient in law.

1. Demurrer *overruled*. After a trial of the issues of fact judgment is rendered
 - (1) for plaintiff
 - (2) for defendant.
2. Demurrer *sustained*. Defendant amends, and after a trial of the issues of fact judgment is rendered
 - (1) for defendant
 - (2) for plaintiff.

II. Which of the following rules best serves procedural ends? (1) The final judgment rule. (2) The rule which permits appeals from orders on demurrers. (3) The rule which gives the trial or the appellate court the discretion to permit appeals from such orders.

KANSAS GENERAL STATUTES ANNOTATED (1935)

60-3302. Appellate Jurisdiction of Supreme Court. The supreme court may reverse, vacate or modify any of the following orders of the district court or a judge thereof, or of any other court of record, except a probate court. *First*—A final order. *Second*—An order . . . that sustains or overrules a demurrer. *Third*—An order that involves the merits of an action, or some part thereof. . . .

60-3303. Final Order Defined.¹ . . . A final order which

¹ The inclusion in § 60-3302 of an explicit authorization to appeal from an order sustaining or overruling a demurrer, indicates that the legislature was of the opinion that such an order is not a "final order" within the meaning of § 60-3303. As we shall see, the courts have almost uniformly held that statutes which au-

may be vacated, modified or reversed as provided in this article is an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment. . . .

NOTES

(1) *Harmon v. James*, 146 Kan. 205, 69 P. 2d 690 (1937): The trial court sustained defendant's demurrer to plaintiff's *third* amended petition, with leave to amend of which plaintiff availed herself by filing a *fourth* amended petition. Defendant then demurred to this petition and, while this demurrer was pending, undisposed of, plaintiff appealed from the order sustaining defendant's demurrer to her *third* amended petition. Appeal *dismissed*. The rule is stated in 4 C. J. S., Appeal and Error, p. 399, as follows: "As a general rule, if a party after an order or judgment upon demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to, or substitutes another therefor so as to remove the grounds of the demurrer, he acquiesces in the judgment or order upon the demurrer, and will not be permitted to appeal therefrom. . . ." ²

(2) *Carothers v. The Board of Education of the City of Florence*, 153 Kan. 126, 127-128, 109 P. 2d 63 (1941): Taxpayers of a school district sought to enjoin the school district board from using a bus to transport pupils to places beyond the school district. Defendants' demurrer to the petition was overruled, and they appealed. "Appellees move to dismiss the appeal for the reason that after their demurrer was overruled defendants filed an answer, to which plaintiffs filed a reply. On behalf of appellees it is argued that defendants thereby waived their right to appeal from the order overruling their demurrer." Motion *denied*. "Our statute (G. S. 1935, 60-3302) makes 'An order . . . that sustains or overrules a demurrer' an appealable order. As is true with all appealable orders, a party against whom it is made may waive his right to appeal by subsequent procedure in the action inconsistent with the position taken by him which resulted in the order from which he seeks to appeal, or which shows clearly that he concedes the correctness of the court's position in the order made. Respecting the general rule that one who pleads over waives his right to appeal, there is an exception to this effect: If the contention is that the petition does not state facts sufficient to constitute a cause of action, or that it discloses the court does not have jurisdiction, the filing of the answer does not waive the right of appeal. (See Phillips on Code

thorize an appeal from "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment," does not implicitly authorize an appeal from an order sustaining or overruling a demurrer.

² Cf. *Dwinnell v. Acacia Mutual Life Insurance Co.*, 155 Kan. 464, 126 P.2d 221 (1942): "By filing her second amended petition, after having instituted appeals from rulings on the preceding petitions, the plaintiff acquiesced in the prior rulings and could not appeal therefrom while her second amended petition was pending."

Pleading, § 306;³ *Scovill v. Scovill*, 144 Kan. 759, 763, 62 P. 2d 852, and authorities there cited.) These exceptions are for the reason that a judgment should not be entered upon a petition which does not state a cause of action; neither should a judgment be rendered in a case in which the court has no jurisdiction. When a party demurs to a pleading and the demurrer is overruled and he pleads over, whether he has waived his right to appeal may depend upon whether or not his plea over is contradictory to the position taken by him on his demurrer. (*Scovill v. Scovill*, *supra*.) Here the answer filed by defendants admitted they had used the bus for trips outside of the district aggregating 242 miles and had used 24 gallons of gas in making such trips, but contended such use was authorized. So, upon the principal point in controversy, the answer is a confession, in part at least, of the principal charge of the petition, and defendants seek to avoid the injunction by the contention they had the legal right to do so. It therefore raises the same legal question presented by the demurrer to the petition. The appeal, therefore, should not be dismissed."

MINNESOTA STATUTES ANNOTATED (1945)

605.09 Appeal to Supreme Court. An appeal may be taken to the supreme court by the aggrieved party in the following cases:

(1) From a judgment in an action . . . ; and upon such appeal the court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from

(3) From an order involving the merits of the action or some part thereof;

(4) From an order sustaining a demurrer, or from an order overruling a demurrer if the court certifies that the question presented by the demurrer which it overrules is important or doubtful.¹ . . . ;

(5) From an order which determines the action, and prevents a judgment from which an appeal might be taken.² . . .

³ This section, somewhat revised, has become section 468 of the second edition of this work. In it, the author says: "When a demurrer has been erroneously overruled, and the demurrant wishes to take advantage of the error, most of the states hold that he must rest upon his demurrer, and allow final judgment to be entered against him; for if he pleads to the insufficient pleading, he thereby waives all objections thereto, except for want of jurisdiction of the subject, or of the subject matter, and for want of sufficient facts. As to these grounds, pleading over is not a waiver of his previous demurrer." See *infra* p. 487, Note 8.

¹ The inclusion in § 605.09 of a provision explicitly authorizing an appeal from an order sustaining a demurrer, or from an order overruling a demurrer if the court certifies that the question presented thereby is important or doubtful, indicates that the legislature was of the opinion that such orders do not fall within the provisions of subdivisions (3) and (5) of the statute.

² N. D. Rev. Code § 28-2702 (1943) is a similar statute.

NEW YORK CIVIL PRACTICE ACT

§ 608. Appeal from Final Judgment. An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court upon a trial by a referee, or by the court without a jury, or upon the verdict of a jury, upon questions of law, or upon the facts, or upon both.³

§ 580. Review of Interlocutory Judgment, or Intermediate Order. An appeal taken from a final judgment or from a final order in a special proceeding brings up for review an interlocutory judgment or an intermediate order, as the case may be, which is specified in the notice of appeal and necessarily affects the final judgment or order; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the division or term of the court to which the appeal from the final judgment or order is taken.⁴ . . .

§ 609. Appeal from Order in Action.⁵ An appeal may be taken to the appellate division of the supreme court from an order in an action, upon notice, made at a special term or trial term of the supreme court or made by a referee to hear and determine, in either of the following cases: . . .

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action and prevents a judgment from which an appeal might be taken.⁶ . . .

³ See New York City Court Act, § 56; Municipal Court Code, § 154.

⁴ See Municipal Court Code, § 155.

⁵ See New York City Court Act, § 57. For the jurisdiction of the Court of Appeals to review interlocutory orders, see Cohen, *The Powers of the New York Court of Appeals*, c. vii (1934).

⁶ Cf. Clark, C.J., dissenting in *Zalkind v. Scheinman*, 139 F.2d 895, 907, n. 5 (C.C.A. 2d 1943): "The unusual emphasis on procedural objections in New York state practice is well known; that it is accentuated by the freedom of appeals on these points can hardly be doubted. A point of practice in a particular case cannot be considered as settled until an appeal is had at least to the Appellate Division. . . . Appeals to the Court of Appeals are more restricted, N. Y. Civil Practice Act, §§ 588, 589, but the number of procedural appeals which do get to that court and the pressure thus put upon the court seem undesirable. . . . The objection is not solely or perhaps even mainly to the overburdening of appellate courts with unnecessary appeals; it is to the resulting improper emphasis upon form which then shapes and distorts the entire practice of the jurisdiction—a point Mr. Crick overlooked in his otherwise excellent article on *The Final Judgment as a Basis for Appeal*, 41 *Yale L. J.* 539." Of free appeals from interlocutory orders the Commission on the Administration of Justice in New York State said [Report 17 (1934)]: "In the City of New York these appeals from practice orders in the course of litigation are twice as numerous as the appeals from final judgments upon the merits. Upstate we find the appeals from final judgments to be twice the number of appeals from practice orders. We believe that the practice of appealing from practice orders of the court of original jurisdiction is a fruitful cause of delay and is unnecessary to justice. We recommend the abolition of the appeal from interlocutory orders which should only be reviewed when and if the final judgment is itself appealed." But the bill which the Commission proposed [Report 300] would have

NOTES

(1) *Mitchell v. Dunmore Realty Co.*, 135 App. Div. 771, 120 N. Y. S. 771 (1st Dep't 1909), affirmed 199 N. Y. 530, 92 N. E. 1092: After answer defendant moved, under Code of Civil Procedure § 547 (Civ. Prac. Act § 476) for judgment on the pleadings, and an order was entered directing judgment dismissing the complaint with leave to plaintiff to amend. Defendant appealed from that part of the order permitting plaintiff to amend; it was reversed; and defendant thereafter entered judgment dismissing the complaint. Plaintiff then brought this appeal and in his notice of appeal "stated that he appealed from such final judgment, and that he also intended to bring up for review" the order directing judgment dismissing the complaint. Defendant contended that this was not an intermediate order within the meaning of Code Civ. Pro. § 1316 (Civ. Prac. Act § 580) which could be reviewed on appeal from the final judgment; that the judgment itself was not appealable; and that, therefore, plaintiff's only right of appeal was from the order itself. The court *rejected* this contention, saying: (i) The order was appealable "for it comes within the express provisions of section 1347 of the Code (Civ. Prac. Act § 609), in which the right to appeal to this court is given where the order involves some part of the merits of an action or affects a substantial right, or, in effect, determines the action and prevents a judgment from which an appeal might be taken." (ii) The judgment was appealable under Code Civ. Pro. § 1346 (Civ. Prac. Act § 608), which provides, *inter alia*, for an appeal from a final judgment rendered in the supreme court upon a trial by the court without a jury." The effect of [Code Civ. Pro. § 547] was that a trial of an action on the pleadings might be had before the court at any Special Term." (iii) "The order for judgment necessarily affects the final judgment entered, and therefore may be included in the appeal from the judgment under the permission granted by section 1316 of the Code (Civ. Prac. Act § 580)," although "undoubtedly the better practice is to appeal from the order, and thus avoid the complications incident to the entry of a judgment before it shall be finally determined whether such judgment is proper."

(2) N. Y. Civ. Prac. Act § 609 is judicially construed as implicitly authorizing an appeal, as of right, to the appellate division from an order of the supreme court, made prior to rather than upon, the trial of an action, which grants or denies a motion under N. Y. R. Civ. Prac. 106 (*supra* p. 371), for judgment dismissing the complaint, or a motion under Rule 109 (*infra* p. 549,) to strike out a defense consisting of new matter contained in an answer.⁷ But if such orders are made at the trial they may be

permitted such appeals if allowed by the court making the order or by the appellate division. The Judicial Council of the State of New York disapproved this recommendation, saying [First Report 47 (1935)]: "[T]he Council believes that the supervisory review over practice and other intermediate matters by the appellate divisions is desirable not only for the purpose of preventing injustices but also for the purpose of certainty and uniformity in litigation. Moreover, the sentiment of the bar seems to be opposed to this proposal."

⁷ See, e.g., *Adreance v. Lorentzen*, 269 App. Div. 987, 58 N.Y.S.2d 257 (2d Dep't 1945); *Furniss v. Furniss*, 148 App. Div. 211, 133 N.Y.S. 535 (1st Dep't

reviewed only upon an appeal from the final judgment in the action.⁸

(3) Statutes of jurisdictions, other than New York, providing for appeals from interlocutory orders, have also been construed as implicitly authorizing appeals from all or from some orders sustaining or overruling demurrers.

For example, N. C. Gen. Stat. Ann. § 1-277 (1943) provides: "An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken. . . ."⁹ This statute has been interpreted as authorizing an appeal from an order sustaining or overruling a demurrer "to the whole cause of action or to the whole defense."¹⁰

To take another example, Md. Ann. Code Gen. Laws art. 5, § 30, authorizes an appeal "from any final decree, or order in the nature of a final decree, passed by a court of equity." The Court of Appeals holds that an order sustaining or overruling a demurrer to "an entire bill of complaint" is an "order in the nature of a final decree" and therefore appealable, because "it finally settles some disputed right or interest of the parties,"¹¹ but that an order sustaining or overruling a demurrer to an answer to a bill is not such an order.¹² But, curiously enough, the

1911); *Kahn v. Johnston*, 177 App. Div. 383, 163 N.Y.S. 984 (3d Dep't 1917); *Morris v. Moglen*, 269 App. Div. 985, 58 N.Y.S.2d 260 (2d Dep't 1945); *Popsicle Corporation v. Eskimo Pie Corporation*, 251 App. Div. 726, 295 N.Y.S. 615 (2d Dep't 1937).

⁸ See, e.g., *Jackman v. Hasbrouck*, 168 App. Div. 256, 153 N.Y.S. 876 (2d Dep't 1915); *Palenius v. M. H. Fishman Co.*, 267 App. Div. 769, 45 N.Y.S.2d 329 (2d Dep't 1943); *Kandell v. American Beverage Corporation*, 263 App. Div. 888, 32 N.Y.S.2d 381 (2d Dep't 1942); *Stephansen v. Westchester County*, 257 App. Div. 1050, 13 N.Y.S.2d 633 (2d Dep't 1939); *Sirota v. Masterbilt Homes, Inc.*, 265 App. Div. 881, 38 N.Y.S.2d 2 (2d Dep't 1942); *Flynn v. Board of Education*, 270 App. Div. 855, 61 N.Y.S.2d 742 (2d Dep't 1946).

⁹ Compare this statute with the statutes set forth above.

¹⁰ See, e.g., *Cody v. Hovey*, 216 N.C. 391, 5 S.E.2d 165 (1939), in which the court said that a demurrer which "challenges the sufficiency of the only pleading which raises an issue," goes "to the heart of the controversy, and affords a direct approach to a determination of the action. Hence an appeal from a judgment overruling or sustaining plaintiff's demurrer [to defendant's answer which interposed only an affirmative defense] merits consideration of the court."

¹¹ See, e.g., *Lessans v. Lessans*, 184 Md. 549, 42 A.2d 132 (1945); *Young v. Cockman*, 182 Md. 246, 34 A.2d 428 (1943). In the *Lessans* case the court said: "If the demurrer is sustained, the complainant can appeal, because the right to proceed with his case is finally settled against him. On the contrary, if the demurrer is overruled, the defendant can appeal, because the decision finally determines the complainant's right to proceed with the case and imposes upon the defendant the necessity of making his defense." But in an earlier case, *Emersonian Apartments v. Taylor*, 132 Md. 209, 103 A. 423 (1918), the Court had had this to say: "While it may be desirable in some equity cases, where the evidence may be at great length and the expenses very heavy, to entertain appeals at once from rulings on demurrers, our observation has been that it is sometimes productive of unnecessary and even vexatious delays, in addition to imposing heavy burdens on litigants, in paying larger fees to their solicitors, who may be required to appear in this court several times, instead of meeting all questions at one hearing."

¹² In the *Lessans* case, *supra*, the court said: "If the answer is held good, the issues of fact which it raises are still open for trial and decision. If it is held bad, the defendant may file another answer in the usual course of procedure. In either

Court has not so interpreted article 5, § 2, of the Code, which authorizes an appeal "from any judgment or determination of any court of law in any civil suit or action." On the contrary, the Court has consistently held that an order sustaining or overruling a demurrer to a declaration is not a "judgment or determination" from which an appeal will lie.¹³ But while dismissing an appeal from such an order in an action at law, the Court will often "express an opinion" on the question of law involved, if it thinks it important that it should.¹⁴

UNITED STATES CODE ANNOTATED

Title 28.

§ 225. (Judicial Code, section 128, amended.) Appellate Jurisdiction.

(a) Review of Final Decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title. . . .

(b) Review of Interlocutory Orders or Decrees of District Courts. The circuit court of appeals shall also have appellate jurisdiction—

First. To review the interlocutory orders or decrees of the district courts which are specified in section 227 of this title.¹ . . .

event, no disputed right or interest of the parties is finally settled, but the questions of fact remain open for determination by final decree, on appeal from which the interlocutory rulings in the case may be reviewed by the Court of Appeals."

¹³ See, e.g., *Emersonian Apartments v. Taylor*, 132 Md. 209, 103 A. 423 (1918); *Penny v. Department of Maryland State Police*, 186 Md. 10, 45 A.2d 741 (1946). In the *Taylor* case the court said that the rule that an appeal may not be taken before final judgment from a ruling on a demurrer in an action at law is well settled in Maryland, and that it is "absolutely necessary" to enforce the rule "in order to prevent the regular progress of a cause unto its final determination from being interrupted by successive appeals from rulings made from time to time during the litigation." Moreover, the court added, an interlocutory judgment overruling a demurrer "neither settles nor concludes any right between the parties. It determines a mere matter of pleading."

¹⁴ See, e.g., *Smith v. Baltimore & Ohio Railroad Co.*, 168 Md. 89, 176 A. 642 (1935), in which the Court expressed such an opinion because "if the court does not entertain [the question] now, it will ultimately come again for delayed consideration," and because the question related to the extent of the state's power of eminent domain. The Court thus concluded its "expression of opinion": "It follows that if the appeal could be entertained, the ruling of the nisi prius court on the demurrers would have been affirmed. The dismissal [of the appeal], therefore, will have the same practical effect as an affirmance."

¹ That is, interlocutory orders or decrees granting, continuing, modifying, refusing or dissolving an injunction, or refusing to dissolve or modify an injunction, or appointing a receiver, or refusing an order to wind up a pending receivership, or to take the appropriate steps to accomplish the purposes thereof.

NOTES

(1) Note, *The Final Judgment Rule in the Federal Courts*, 47 Col. L. Rev. 239, 242 (1947): "The Judicial Code limits review of district court adjudications by the federal circuit courts of appeals to 'final decisions' and continues, with slight modification, a policy enunciated in the first Judiciary Act. This adherence to the rule that no appeals may be taken from interlocutory orders or decrees stems from the belief that piecemeal appeals will occasion unnecessary delay and expense for the litigants, will overcrowd the dockets of the appellate courts, or will raise issues on appeal that may subsequently be rendered 'harmless' or cured by final judgment in favor of the putative appellant.²

"The rule is applied almost automatically in determining the finality of orders modifying pleadings with leave to amend, dismissing complaints,³ or disposing of matters preliminary to the trial."

(2) *United States v. 243.22 Acres of Land*, 129 F. 2d 678, 680 (C. C. A. 2d 1942): "'Final' is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts. What was said as to 'final' orders a half century ago [in *McGourkey v. Toledo & O. Cent. R. Co.*, 145 U. S. 536, 544, 13 S. Ct. 170, 36 L. Ed. 1079 (1892)] still holds: 'The cases, it must be conceded, are not altogether harmonious.' There is, still, too little finality about 'finality.' [See *Crick, The Final Judgment Rule as a Basis for Appeal*, 41 *Yale L. J.* (1932) 539, 561-562.] 'A final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding.' [Rubert Hermanos, Inc., v. People of Puerto Rico, 1 Cir., 118 F. 2d 752, 757.] But it

² Cf. *Catlin v. United States*, 324 U.S. 229, 233-234, 65 S. Ct. 631, 89 L. Ed. 911 (1945): "The foundation of this policy [against appeals except from final judgments] is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341, 13 S. Ct. 356, 37 L. Ed. 194. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals." Cf. also *Frank, C.J.*, in *United States v. 243.22 Acres of Land*, 129 F.2d 678, 680, n. 4 (C.C.A. 2d 1942): "There are several bases of the policy against piecemeal appeals. In part, as *Crick* shows, it has its roots in the accidents of the history of common law procedure. In part, it stems from the desire to prevent interruptions of trials to rectify errors which often turn out to be harmless. Cf. *Perkins v. Endicott Johnson Corp.*, 2 Cir., 128 F.2d 208; *Cobbledick v. United States*, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783. In part, it derives from a desire to prevent congestion in appellate courts. Whether that last purpose has been served is by no means certain; as the question of what is 'final' provokes many appellate court decisions, this may be an instance where, as *Crick* says, a labor-saving device causes more labor than it saves."

³ An order dismissing a complaint is final and appealable [*Vietti v. Wayne*, 136 F.2d 771 (App. D. C. 1943); *Modin v. Matson Nav. Co.*, 128 F.2d 194 (C.C.A. 9th 1942); see *Safeway Stores v. Coe*, 136 F.2d 771, 773, 78 App. D. C. 19 (1943)] unlike an order which merely grants a motion to dismiss [*Tee-Hit-Ton Tribe of Tligit Indians of Alaska v. Olson*, 144 F.2d 347 (C.C.A. 9th 1944); see *Wright v. Gibson*, 128 F.2d 865, 866 (C.C.A. 9th 1942)] or which denies a motion to dismiss. *Ballard v. Mutual Life Ins. Co. of New York*, 109 F.2d 388 (C.C.A. 5th 1940): accord, *United States v. Adler's Creamery*, 110 F.2d 482 (C.C.A. 2d 1940) (order denying defendant's motion to dismiss complaint of an intervening plaintiff); see *Clark v. Kansas City*, 172 U.S. 334, 338, 19 S. Ct. 207, 43 L. Ed. 467 (1899). The fact that the judgment of dismissal leaves the merits undetermined and may not be a bar to another action does not make it interlocutory. [Author's footnote.]

is not easy to determine what decisions short of that point are final." ⁴

OREGON COMPILED LAWS ANNOTATED (1940)

§ 10-801. Mode of Reviewing Judgments or Decrees: Orders Deemed Judgments or Decrees: Amount in Controversy. A judgment or decree may be reviewed on appeal as prescribed in this chapter and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein . . . , for the purpose of being reviewed on appeal, shall be deemed a judgment or decree.¹ . . .

SANDBLAST v. OREGON LIQUOR CONTROL COMMISSION

Supreme Court of Oregon, 1945. 177 Or. 213, 161 P.2d 919.

KELLY, JUSTICE. On August 19, 1944, plaintiff filed a complaint in the Circuit Court for Multnomah County, the prayer of which is as follows:

"Wherefore, plaintiff prays that the Oregon Liquor Control Commission be required to sell and deliver to the plaintiff one quart of whiskey in excess of a quart and a 'fifth' of whiskey which he has heretofore acquired by sale and purchase from the Oregon Liquor Control Commission during the month of August, 1944, thereby providing the plaintiff with two quarts of standard brand of alcoholic liquor known as whiskey which it has in its possession for sale, for the month of August, 1944, and for his costs and disbursements incurred herein."

Based upon that complaint, an order was made directing the issuance of an alternative writ of mandamus, which was issued and served upon defendant commission. To that alternative writ a demurrer was filed and on August 25, 1944, an order was duly made sustaining said demurrer and granting plaintiff until and including August 28, 1944, in which to file an amended alternative writ of mandamus.

On August 28, 1944, plaintiff filed an amended complaint and petition for the issuance of an amended writ of mandamus;

⁴ Cf. *Vincent v. Plecker*, 319 Mass. 560, 67 N.E.2d 145 (1946); Note, *The Final Judgment Rule in the Federal Courts*, 47 Col. L. Rev. 239, 240-241 (1947).

¹ For examples of identical or very similar statutory provisions, see Neb. Rev. Stat. §§ 25-1902, 25-1911 (1943); S. D. Code § 33.0701 (2) (1939); Ohio Code Ann. § 1223-2 (1940); Wyo. Comp. Stat. Ann. § 3-5301 (1945). Compare with this statute and the subsequent cases N. M. R. Civ. Pro. 5(2), and the following cases interpreting it: *Wanser v. Fuqua*, 46 N.M. 217, 126 P.2d 20 (1942); *Burns v. Fleming*, 48 N. M. 40, 145 P.2d 861 (1944); *Miller v. Montano*, 48 N. M. 78, 146 P.2d 172 (1944); *Foster v. Addington*, 48 N.M. 212, 148 P.2d 373 (1944); *Floyd v. Towndraw*, 48 N. M. 444, 152 P.2d 391 (1944).

and an order was duly made directing the issuance of an amended alternative writ of mandamus. Said amended writ was thereupon issued and on August 30, 1944, a demurrer thereto was filed.

On August 31, 1944, an order was duly made and entered sustaining said last mentioned demurrer.

Omitting the title, said order is as follows:

"This matter coming on regularly to be heard on the 20th day of August, 1944, in the above entitled court and cause upon the Demurrer of the defendant, Oregon Liquor Control Commission, to plaintiff's Amended Alternative Writ of Mandamus; plaintiff appearing in person, and defendant, Oregon Liquor Control Commission, appearing by its attorney, Ernest M. Jachetta; and the court having listened to the arguments of counsel, and the court being of the opinion that the Demurrer to the Amended Alternative Writ of Mandamus should be sustained; and the court being fully advised in the premises, now, therefore,

"It is Ordered, that the Demurrer of the defendant, Oregon Liquor Control Commission, to plaintiff's Amended Alternative Writ of Mandamus be and the same is hereby sustained.

"Dated at Portland, Oregon, this 31st day of August, 1944.

"Walter L. Tooze,
"Judge."

Omitting its title the following is the only notice of appeal appearing in this record, to-wit:

"To the defendant, Oregon Liquor Control Commission, an agency of the State of Oregon, acting through and by G. P. Lilley, H. R. Kirkpatrick and P. L. Crooks, as Commissioners and Ray Conway, as Administrator and Secretary thereof:

"You will please take notice that the Petitioner, L. B. Sandblast, hereby appeals to the Supreme Court of the State of Oregon from the Order and Judgment made and entered by the Honorable Walter L. Tooze in sustaining defendant's demurrer to the petitioner's Amended Alternative Writ of Mandamus entered in the above-entitled court on the 31st day of August, 1944, in favor of the Respondent and against said Petitioner, L. B. Sandblast; and from the whole thereof.

"Dated this 5th day of September, 1944.

"L. B. Sandblast

"Attorney for Petitioner Appellant."

An order sustaining a demurrer is not appealable. [Citations omitted.]

None of the foregoing authorities is a case in mandamus; however, the general rule that only final judgments and orders are reviewable by appeal, writ of error or other proceedings for

review,¹ unless it is otherwise provided by constitutional or statutory provisions, applies to mandamus proceedings. 38 C. J., Subject, Mandamus, p. 942, § 739.

"No appeal lies before final judgment² from rulings on demurrers to the pleadings except as they come within the terms of a special statute dealing therewith or within the terms of general statutes permitting appeals from interlocutory orders." 4 C. J. S., p. 220, Subject, Appeal and Error, § 116, Subsec. c, Subtitle, Pleadings, paragraph (6).

We find no constitutional provision or special or general statute rendering inapplicable hereto the general rule above stated.

The statute provides that the defendant on whom a writ of mandamus shall have been served may show cause by demurrer or answer to the writ in the same manner as to a complaint in an action. Sec. 11-307, Vol. 2, O.C.L.A. p. 338. The pleadings in mandamus proceedings consist of the alternative writ or a peremptory writ, the demurrer to the writ or answer thereto and the demurrer or reply to the answer. These pleadings may be amended in the same manner as pleadings in an action. Sections 11-307, 11-308 and 11-309, Vol. 2, O.C.L.A. p. 338.

Even if the record should disclose that an appealable order was entered in the instant case, there is no notice of appeal therefrom in this record. As above shown, the notice of appeal herein is directed only to the order sustaining the demurrer aforesaid.

To confer appellate jurisdiction upon this court it is essential that an appealable order, judgment or decree be rendered by the trial court. It is also essential that a notice, either orally or in writing, be given of an appeal from such an order, judgment or decree. These requisites are jurisdictional. Neither of them is to be found in the record before us in this case.

For these reasons, the appeal herein is dismissed.³

¹ Cf. *Lully v. National Surety Co.*, 106 N.J.L. 81, 148 A. 762 (1930): "It is an ancient rule of law that error (now appeal) will lie only after final judgment."

² Cf. *Board of Education v. Board of Education*, 301 Ill. App. 228, 22 N.E.2d 400 (1939): "Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without day, or words of similar import and meaning."

³ For recent cases arising under statutes identical with or very similar to the Oregon statute, which are in accord with the *Sandblast* case, see *Board of Education v. Board of Education*, *supra* note 2; *Lawer Auto Supply Co. v. Teton Auto Co.*, 45 Wyo. 119, 16 P.2d 38 (1932); *Spruill v. Hamilton*, 207 Ark. 468, 181 S.W.2d 35 (1944); *Meyer v. Daniel*, 147 Ohio St. 27, 67 N.E.2d 789 (1946); *Goodloe v. City of Richmond*, 278 Ky. 794, 129 S.W.2d 563 (1939).

NOTES

(1) *Anson v. Kruse*, 147 Neb. 989, 25 N.W.2d 896 (1947): Defendant appealed from an order overruling his demurrer to the complaint.⁴ *Appeal dismissed.* (i) "A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant."⁵ (ii) "In the instant case the defendant did not elect to stand upon his demurrer⁶ and submit to rendition of a judgment against him. The order overruling the demurrer was not followed by further judicial proceedings or the rendition of a judgment. It did not completely and finally dispose of the substantial merits of the case and terminate the litigation." (iii) "Accordingly, we conclude that the order was not a final one within the meaning of our statute. . . ."

(2) *Northwestern Engineering Co. v. Ellerman*, 69 S. D. 397, 10 N. W. 2d 879 (1943): Defendants moved to dismiss the complaint. The court granted the motion but gave plaintiff leave to amend. Plaintiff appealed from this order and defendants moved to dismiss the appeal on the ground that the order was not one from which under S. D. Code § 33.071(2) (1939), plaintiff might appeal as of right and plaintiff had not obtained leave to appeal. Motion *denied*. (i) "In order to appeal as a matter of right from orders as classified by subdivision 2, three things must appear: First, the order must affect a substantial right; second, the order must in effect determine the action; and third, the order must prevent a judgment from which an appeal might be taken. While it appears that the order under consideration does affect a substantial right and does in effect determine the action (the appellant having elected to stand upon its complaint and not amend), nevertheless, it appears from the order itself, that it does not prevent a judgment from which an appeal might be taken. We are of the opinion, therefore, that appellant was not entitled as a matter of right to appeal from this order." (ii) But other statutes⁷ authorize the court to permit the appeal. "We believe we should exercise our power and permit the appeal in this case. The appeal from the order was not taken until after the twenty-day period, within which plaintiff was permitted to amend its complaint, had expired. The entry of a judgment

⁴ Neb. Rev. Stat. § 25-1911 (1943) authorizes appeals from final judgments and orders, and § 25-1902 defines a final order as one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment."

⁵ See c. II, section 1, *supra* p. 79.

⁶ See Note, 21 A.L.R. 264 (1922). Cf. *Dunklin v. Watkins*, 202 Ark. 602, 151 S.W.2d 978 (1941): "An order sustaining or overruling a demurrer becomes a final judgment if the party adversely affected thereby elects to stand on his pleading or demurrer, as the case may be."

⁷ S. D. Code § 33.0701 (1939) authorizes appeals from: "(1) A judgment; (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken. . . . (6) Any other intermediate order made before trial, any appeal under this subsection, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such Court only when the Court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding." See also §§ 33.0704, 33.0706, 33.0729.

based upon this order was a mere formality, and while the entry of such judgment was necessary to give plaintiff the right to appeal as a matter of right, the practical effect of the order standing by itself is to determine the action and all the issues adversely to the plaintiff. It might be that the order would not constitute a bar to a subsequent action (*Bode v. New England Investment Co.*, [1 N. D. 121, 45 N. W. 197]), but its effect in so far as plaintiff's present action is concerned is a determination of all issues adversely to the plaintiff. Under these circumstances, we believe the mistake or inadvertence, in failing to file and serve a petition for allowance of the appeal with the notice of appeal, should be excused."

(3) *Devoe v. Dusey*, 205 Iowa 1262, 217 N. W. 625 (1928):⁸ "[A] party may not appeal from an adverse ruling on a demurrer unless he elects to stand upon his pleading or suffers judgment for want of pleading or of amendment to his pleading. . . . The reason for such a rule is manifest. A ruling on a demurrer adjudicates nothing, except upon the election of the defeated party to stand upon his pleading." "The ruling of the trial court upon a demurrer is subject to change throughout the trial. It puts no obstacle in the way of a change of opinion by the trial court. The effect of such ruling may be obviated by later pleadings. All of this would be true if the ruling were prematurely reviewed by us." "To allow an appeal from a mere ruling by the trial court in settling the issues would open the door to endless appeals to this court from rulings that lack finality."⁹

(4) Ind. R. Pro. Prac. rule 2-3, provides: "No appeal will be dismissed as of right because the case was not finally disposed of in the court below as to all issues and parties, but upon suggestion or discovery of such a situation the appellate tribunal may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable, without prejudice to parties who may be aggrieved by subsequent proceedings in the court below. . . ." The defendant in *Kelley, Glover & Yale, Inc. v. Globe Indemnity Co.*, — Ind.App. —, 70 N. E. 2d 639 (1947), who appealed from an order overruling its demurrer to plaintiff's fourth amended complaint, contended that the order constituted a final adjudication of the question of law raised by the demurrer and that, if it were reversed, the case would be disposed of and a long trial "of the involved facts set forth in the complaint" would be rendered unnecessary. Defendant therefore urged the court, in the exercise

⁸ At the time of this decision Iowa Code §§ 12822-12823 (1939) were in force. They have since been superseded by Iowa R. Civ. Pro. 331-333, for which see *infra* p. 490.

⁹ Cf. *Yates v. Box*, 194 Miss. 374, 11 So.2d 802 (1943): "Were we to take jurisdiction of this appeal [from a decree sustaining demurrers to the bill] and hold that the demurrers were properly sustained, the bill on remand would be capable of amendment in material particulars, and when so amended might be good as against any further demurrer. We therefore repeat what was said in [prior cases] that: 'Appeals from amendable bills demurred to and the demurrer sustained or overruled do not settle all of the controlling principles of a case, and these cannot be known or determined sufficiently until the pleadings have been settled. If we entertained appeals to amendable bills from interlocutory decrees sustaining or overruling demurrers, it would result in delay or expense rather than save it.' But see *Notes* (4) and (5), *infra* p. 485.

of the discretion given it by the above rule, to decide the issue "in order to save labor and expense to the parties." This, the court refused to do, for the following reasons: (i) "This cause has not finally been disposed of in the court below, nor has any action been taken by the trial court following the overruling of defendant's demurrer. . . . Previous to adoption of the above rule, it was well settled that an appeal could only be taken from a final judgment which disposed of all of the issues in the case, or upon a matter which left nothing for the future determination of the court." (ii) "We do not feel that the issue presented by the appeal . . . is sufficient to justify this court in invoking its discretion under Rule 2-3. To hold otherwise, we feel would lead to an unwise and improper extension of the rule and would tend to create situations of greater eventual delay in the final disposition of cases. To authorize or encourage numerous piecemeal appeals on each ruling of a trial court would defeat the very purpose of the rule itself." (iii) "Therefore, the consideration of this appeal is hereby suspended and postponed until all of the issues pending in the Porter Circuit Court have been fully and finally disposed of and determined." *Cf. Foster v. Addington*, 48 N. M. 212, 214, 148 P. 2d 373 (1944).

OREGON COMPILED LAWS ANNOTATED (1940)

§ 10-812. Review of Intermediate Orders: Directing Restitution. Upon an appeal, the appellate court may review any intermediate order involving the merits, or necessarily affecting the judgment or decree appealed from; and when it reverses or modifies such judgment or decree, may direct complete restitution of all property and rights lost thereby.

NOTES

(1) *Culp v. State*, 109 Okl. 6, 7, 234 P. 730 (1925): Defendants excepted to an order overruling their demurrer to the petition but refused to elect to stand on their demurrer. The order provided that "further orders to plead . . . will be made or taken in accordance with the judgment of the Supreme Court as will appear from the mandate therein." Appeal *dismissed*.¹ "The defendants in the court below should be required to elect whether they will stand upon their demurrer; if they elect to stand, judgment should be rendered and entered for plaintiff, and appeal may be then taken by defendants to this court. If defendants shall elect to plead further they may save their exceptions to the action of the court in overruling their demurrer and the question may be properly presented to this court upon the whole case, when final judgment shall have been rendered and appeal shall have been taken to this court."

¹ The provisions of Okl. Stat. tit. 12, § 952 (1941) authorize the Supreme Court to review the judgments of the inferior courts and "in the reversal of such judgment" to "reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof." § 19-953 is substantially the same as Or. Comp. Laws Ann. § 10-801, *supra* p. 478.

(2) *Smith v. Barksdale*, 199 Ga. 723, 35 S. E. 2d 149 (1945): Writ of error *dismissed*.² "The only ruling excepted to is one overruling a general demurrer to the petition. . . . While the losing party . . . has the option of having reviewed a judgment on a demurrer by a direct bill of exceptions or to have certified and filed exceptions *pendente lite*, if the latter course be followed the ruling on the demurrer becomes a *pendente lite* ruling which is reviewable only after the termination of the case and in a bill of exceptions assigning error on the final judgment. The ruling on the demurrer [in this case] having become a *pendente lite* ruling upon the certification and filing of exceptions *pendente lite* by the defendant, the writ of error is prematurely brought to this court, and the motion of the defendant in error to dismiss the same on that ground must be sustained.³ This rule of practice will in no case result in injury to the demurrant. Should the trial result in a judgment in the demurrant's favor, the ruling on demurrer is harmless. If, on the other hand, the trial results in a judgment against the demurrant, a reversal of the ruling on demurrer may be had by error on the exceptions *pendente lite* in a direct bill of exceptions to the final judgment."⁴

(3) *Adams v. McMickle*, 176 Or. 459, 158 P. 2d 648 (1945): Defendant demurred to the amended complaint and, his demurrer having been overruled, declined to plead further. Thereupon a decree was rendered in favor of plaintiff, from which defendant appealed. The court *held* that his demurrer was properly overruled but nevertheless *vacated* the order of the trial court awarding a decree in plaintiff's favor and *remanded* the cause for further proceedings. The court said: "We are . . . of the opinion that defendant acted in good faith in declining to plead further until the question here involved could be heard on appeal and therefore defendant should have an opportunity to answer plaintiff's amended complaint and if issue is joined thereupon a trial should be had, and a decree based upon the evidence then presented should be rendered."⁵

² Ga. Code Ann. § 6-701 (1933) provides: "No cause shall be carried to the Supreme Court or Court of Appeals upon any bill of exceptions while the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause or final as to some material party thereto; but, at any stage of the cause, either party may file his exception to any decision, sentence, or decree of the superior or city court; and if the same is certified and allowed, it shall be entered of record in the cause; and should the case at its final determination be carried by writ of error to the Supreme Court or Court of Appeals by either party, error may be assigned upon such bill of exceptions, and a reversal and new trial may be allowed thereon, when it shall be manifest that such erroneous decision of the court has or may have affected the final result of the case."

³ *Cf.* *Chase v. United States Fidelity & Guaranty Co.*, 71 R.I. 81, 42 A.2d 488 (1945).

⁴ *Cf.* *Funkhauser Equipment Co. v. Carroll*, 161 Kan. 428, 168 P.2d 918 (1946): Defendants appealed from an order striking certain matter from their answer on the ground that it was no defense to plaintiff's cause of action. Plaintiff contended that the order was not appealable because "within the sound discretion of the trial court." But, the court pointed out, the effect of the order was to deprive defendants of a defense pleaded on the merits. The court added: "If this motion was properly sustained then defendants will never again have an opportunity to take advantage of the matter stricken as a defense."

⁵ *Cf.* *Davis v. O. D. Purrington Co., Inc.*, 58 R.I. 482, 193 A. 524 (1937); *Owens v. Rutherford*, 200 Ga. 143, 36 S.E.2d 309 (1945); *Oliver v. Hood*, 209

(4) *Stamford Dock & Realty Corporation v. City of Stamford*, 124 Conn. 341, 200 A. 343 (1938): Plaintiffs' demurrer to the answer having been overruled, upon their motion judgment was rendered for defendant without prejudice to their right of appeal. Plaintiffs appealed and the supreme court decided that the ruling on their demurrer was correct. "The effect of this decision was to leave in full force the judgment for the defendant rendered by the trial court." Plaintiffs then moved that the court alter its judgment and remand the case to the trial court for further proceedings. Motion *denied*. (i) "In some jurisdictions, by statute, or rule of court, or even without either, it would seem that a case may be remanded for further proceedings after affirmance in such a situation as that before us." (ii) But under Connecticut practice the only "logical result" of the decision that the trial court did not err in overruling the demurrer was that its judgment remained in full force. A party may appeal to the Supreme Court of Errors only from a final judgment and the overruling of a demurrer is not such a judgment. The demurrant may appeal only when judgment has been rendered upon the issues in the case. A final judgment rendered because the demurrant refuses to plead further is none the less final. If upon the affirmance of such a judgment the case could be remanded for further proceedings, the judgment appealed from would not be final. The situation is well expressed in *Whiting v. New York*, 37 N. Y. 600, where it is said: 'Where a pleading is sustained, the demurrer being overruled, and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment; and if he submit to judgment, the judgment is final. If he appeal therefrom to this court, such appeal comes here on the question of affirmance or reversal only; and no leave to the demurrant to answer or plead anew can be given. The judgment here is absolutely final.'

(5) *Keljikian v. Star Brewing Co.*, 303 Mass. 53, 20 N. E. 2d 465 (1939): Plaintiffs appealed from an order sustaining a demurrer to their declaration. The court held that the demurrer was rightly sustained and therefore *affirmed* the order, and, exercising the power given it by Mass. Gen. Laws, c. 231, § 125 (1932) "to render any judgment . . . that ought to have been made upon the whole case," *rendered* judgment for defendant because it was of the opinion that plaintiffs could not amend their declaration so as to state a cause of action. In the course of its opinion the court *said*: "A plaintiff appealing from the sustaining of a demurrer to his declaration has no right to come here until the case is ripe for final judgment if the order sustaining the demurrer shall be affirmed.⁶ The statutes and cases already reviewed show that when he appeals, instead of seeking

⁶ Mass. Gen. Laws, c. 231, § 96 (1932) provides in part: "A party aggrieved by any order of the superior court sustaining or overruling a demurrer which alleges that the facts stated in the pleadings demurred to do not in law support or answer the action, . . . may appeal therefrom to the supreme judicial court; but no appeal or exception shall be entered in the supreme judicial court until the case is in all other respects ripe for final disposition by the superior court . . . [The supreme judicial court] may, for good cause, allow the parties to withdraw or amend their pleadings, and if they result in an issue of fact, the case shall be remanded to the superior court for trial."

to amend,⁷ so far as his strict rights are concerned he stakes the result of his lawsuit upon the adequacy of his case as stated in his declaration. If he were at liberty, instead of seeking to amend after an order sustaining a demurrer, to appeal and thus insist upon a decision by this court as to the sufficiency of his declaration, entertaining all the while a justified expectation that after a decision against him on appeal he would be allowed to amend and go on with the case, he could without risk compel this court to waste time and effort, needed for pressing and important matters in deciding moot and inconsequential questions of pleading." Consequently, "amendment of the declaration is not to be expected, unless demanded by some unusual considerations of justice."⁸

(6) *Rivers v. Key*, 189 Ga. 832, 833-834, 7 S. E. 2d 732 (1940): General demurrers to the petition were sustained with leave to plaintiffs to amend. Plaintiffs did amend their petition, and then sued out a bill of exceptions assigning error upon the order sustaining the demurrers. Writ of error *dismissed*. (i) "Whether or not the petition . . . was defective . . . , the plaintiffs having submitted to the adverse ruling on the demurrers by requesting leave and seeking to amend so as to conform thereto, they cannot thereafter be heard to complain that the ruling was erroneous and that the amendment they elected to offer was in fact unnecessary; and this is true notwithstanding they have sued out a writ of error on such ruling. . . ." (ii) "Since the plaintiffs must be held to have acquiesced in the ruling on the general demurrers and to have waived all right of exception thereto, and since there is no other order which can be treated as final . . . , not only must the writ of error be dismissed but plaintiffs' request that the court direct that their bill of exceptions be treated as exceptions *pendente lite* must be denied. Since they "have altogether waived the right to except to such ruling on the demurrers, . . . they could not do so by exceptions *pendente lite*."⁹

(7) *Hartke v. Abbott*, 119 Cal. App. 439, 440, 6 P. 2d 578 (1931): A demurrer to the answer having been sustained, defendant filed an amended answer. A demurrer to the amended an-

⁷ The court points out that in Massachusetts a defence to the merits must be permitted a defendant if his demurrer to a declaration is overruled, but that, if it is sustained, the court may refuse to permit the plaintiff to amend the declaration. If he is given leave to amend, the case is not "ripe for judgment" until the period allowed for amendment has elapsed or until any motion to amend has been disposed of. *Cf. Mottla*, Massachusetts Practice, § 186 (1942).

⁸ *Cf. Vincent v. Plecker*, 319 Mass. 560, 67 N.E.2d 145 (1946); *School Committee of Winchendon v. Selectmen of Winchendon*, 300 Mass. 266, 15 N.E.2d 230 (1938).

⁹ *Cf. Sheehy v. Roman Catholic Archbishop of San Francisco*, 49 Cal. App. 2d 537, 541, 122 P.2d 60 (1942): "Upon the order sustaining the demurrer being made, the pleader has two avenues open to him. He may test the sufficiency of his pleading upon the judgment sustaining the demurrer, or he may accept the judgment that the complaint was not good and file an amendment. If he elects to pursue the latter course he impliedly confesses that the original pleading was not sufficient and that it should be corrected. Having made his election, he may not then claim the benefit of the original pleading and the amended one too." *Cf. also Miller v. Massachusetts Mutual Life Insurance Co.*, 183 Md. 19, 36 A.2d 517 (1944); *Pierson v. Minnehaha County*, 26 S.D. 462, 128 N.W. 616 (1910).

swer was also sustained without leave to amend, and defendant appealed from the judgment entered upon this ruling. "Having elected to amend his answer appellant waived his right to object to the order sustaining the demurrer to the original answer. It would be anomalous for a defendant to join issue by an amended answer, go to trial on the merits on issues chosen by himself and then, when the cause was decided against him, assign error because of a ruling on an answer not involved in the trial and judgment. The question is, therefore, as to the sufficiency of the amended answer."¹⁰

(8) *Cottrell v. Gerson*, 371 Ill. 174, 179, 20 N. E. 2d 74 (1939): Defendant's demurrer to the declaration for misjoinder was overruled, and he pleaded over. Upon appeal from a judgment for plaintiff after a trial of the issues of fact, he assigned this ruling as error. "It has always been the rule in this State that if a party wishes to have the action of the court in overruling his demurrer reviewed, he must abide by his demurrer. By pleading over, he waives his demurrer and the right to assign error upon the ruling. He does not waive innate and substantial defects in the declaration which would render it insufficient to sustain the judgment, and the question whether it is so far defective may be considered on review. The question which could be thus presented was not so broad as those questions which could be raised on demurrer, for the reason that defects in pleading may be aided by the pleadings of the opposite party, or be cured by the statute on Amendments and Jeofails, or by intentment after verdict. . . . Section 6 of the statute on Amendments and Jeofails (Ill. Rev. Stat. 1937, c. 7, § 6) provides, among other things, that a judgment upon a verdict shall not be arrested or reversed for any mispleading. In *Chicago and Alton Railroad Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011, the question of the sufficiency of a declaration because of a misjoinder of counts was raised by motion in arrest. We held that a misjoinder is a 'mispleading' within the meaning of the statute, and affirmed a judgment on the verdict for the plaintiff. The defect here complained of is of the same character and is cured by the verdict."¹¹

(9) *Lane County v. Bristow*, 179 Or. 653, 173 P. 2d 954 (1946): On appeal from a decree for plaintiff, rendered after a trial of the issues of fact, defendant contended that the court erred in striking certain allegations from his original answer. "Plaintiff says that defendant has waived the alleged error by filing an amended answer from which the allegations stricken were omitted, and cites as authority *Voyt v. Bekins Moving & Storage Co.*, 169 Or. 30, 38, 119 P. 2d 586, 127 P.2d 360. That case, however, was decided before the enactment of Ch. 279, Oregon Laws

¹⁰ Cf. *Harmon v. James*, *supra* p. 471; *Frenn v. Nabours*, 177 Okl. 428, 60 P.2d 386 (1936); *Sinkey v. Temple Lumber Co.*, 131 S.W.2d 809 (Tex. Civ. App. 1939); *Falzone v. Gruner*, 132 Conn. 415, 45 A.2d 153 (1945).

¹¹ The court was careful to point out that the action was governed by the former Practice Act (Smith-Hurd Ill. Rev. Stat., c. 110 Append., § 1, *et seq.*) and not by the Illinois Practice Act of 1933. Cf. *Stephens v. Kansas City Gas Co.*, 354 Mo. 835, 191 S.W.2d 601 (1946); *Grover Irrigation and Land Co. v. Lovella Ditch, Reservoir and Irrigation Co.*, 21 Wyo. 204, 131 P. 43 (1913); *Carothers v. The Board of Education of the City of Florence*, *supra* p. 471; *De Loach Mill Manufacturing Co. v. Bonner*, 64 Ark. 510, 43 S.W. 504 (1897).

1943, on amendment of § 1-903, O. C. L. A., which changed the rule of practice theretofore prevailing in this particular. The amendment, so far as now pertinent, reads: 'In all cases where part of a pleading is ordered stricken, the court may, in its discretion, require an amended pleading to be filed which eliminates the matter ordered stricken. By complying with the court's order, the party filing the amended pleading shall not be deemed to waive the right to challenge the correctness of the court's ruling upon the motion to strike and it shall be subject to review on appeal from final judgment in said case.'

(10) *Stianson v. Stianson*, 40 S. D. 322, 325-326, 167 N. W. 237 (1918): Defendant demurred to the complaint for want of facts and, his demurrer being overruled, assigned the ruling as error and answered. He appealed from an adverse judgment after a trial of the issues of fact. "It is settled in this jurisdiction that the filing of an answer and a trial on the merits after a demurrer waives the demurrer and the right of appeal from an adverse decision thereon. *Pierson v. Minnehaha Co.*, 26 S. D. 462, 128 N. W. 616, Ann. Cas. 1913B, 386. This waiver, however, does not extend to an alleged error presenting a like question as to the sufficiency of facts, or want of jurisdiction upon a proper record on appeal from the judgment. *Pierson v. Minnehaha Co.*, 28 S. D. 534, 134 N. W. 212, 38 L. R. A., N. S., 261. It is not the theory of our system of appellate procedure to permit the reversal of judgments after a trial upon the merits for defects in pleadings which might have been remedied by amendment prior to or at the trial. But the sufficiency or insufficiency of the facts proved at the trial, or want of jurisdiction of the person or subject-matter, apparent from the trial record, may always be reviewed upon proper exception and assignments of error. . . . Any questions raised by the demurrer as to the sufficiency of the facts pleaded have become immaterial, and are not subject to review upon this appeal. But it is proper, regardless of the insufficiency of the pleadings, to review assignments of error which challenge the sufficiency of the evidence to sustain the findings and judgment."

(11) Note, *The Final Judgment Rule in the Federal Courts*, 47 Col. L. Rev. 239, 251-252 (1947): "Orders which question the adequacy or form of pleadings are ordinarily correctable and usually are followed by a trial. To allow appeals to be taken from interlocutory orders of this type serves no purpose since, regardless of the outcome of the appeal, a trial is almost certain to follow and to authorize immediate appeals may provide an opportunity for delaying and obstructing the trial itself. If the pleading is merely formally defective or if the complainant fails to state a cause of action but has one and a motion to dismiss is granted,¹² an affirmance on an appeal taken immediately would result only in amendment. If the ruling is reversed, a trial is still in order. Obviously the same consequences in reverse order attend where the motion to dismiss is denied and an appeal from

¹² In this situation the plaintiff is not prejudiced by virtue of the fact that he cannot take an appeal immediately. Federal Rule 15 (a) provides that leave to amend "shall be freely given when justice so requires." If such leave is not given, he can appeal from the judgment of dismissal. [Author's footnote.]

that order is taken. However, where the plaintiff states no cause of action and has none¹³ and the trial court denies a motion to dismiss, the final judgment rule does make necessary a fruitless trial which an interlocutory appeal could prevent. But since this situation will occur infrequently and the unnecessary trial can be quickly curtailed by the non-suiting of the pleader as soon as the inadequacies of his case unfold, there appears to be no real reason for allowing an exception to the final judgment rule in this case." Compare with the certainty of this judgment regarding what is prudent, legislative and professional tergiversations of which the following are typical: In *Mays v. Barnhart*, 67 N. E. 2d (Ohio App. 1943), the court said: "A few years ago the legislature at the instance of the Ohio Bar Association sought to enact legislation making a ruling on demurrer a final order, but the Supreme Court held such act unconstitutional." In *Hale v. City of Belle Fourche*, 67 S. D. 435, 293 N. W. 631 (1940), the court said: "An order sustaining or overruling a demurrer was within those enumerated in Revised Code 1919, sec. 3168. This provision was omitted from Code 1939, 33.0701. So an order overruling a demurrer is an intermediate one from which there is no appeal as a matter of right." In *Milde v. Leigh*, 74 N. D. 15, 24 N. W. 2d 55 (1946), the court said: "Section 7841 C. L. of 1913 specifically included an order which 'sustains or overrules a demurrer' among the reviewable orders. As reenacted this section appears as Section 28-2702 of the Revised Code of 1943. The latter section omits the order overruling a demurrer from the list of reviewable orders. The omission was not inadvertently made for the notes of the Code Commission show the following: 'The provision for an appeal from an order overruling a demurrer has been omitted . . . to eliminate unnecessary appeals which do not finally settle a controversy.'"

IOWA RULES OF CIVIL PROCEDURE¹

86. Pleading Over; Election to Stand.

If a party required or permitted to plead further by an order or ruling, fails to do so within the required time, he thereby elects to stand on the record theretofore made. On such election, the ruling shall be deemed a final adjudication without

¹³ The same situation occurs where the plaintiff states a cause of action, although he has none, and a motion for summary judgment with affidavits is denied. Fed. Rule 56. [Author's footnote.]

¹ These rules were prescribed by the Iowa Supreme Court and reported to the Fiftieth General Assembly under the provisions of Chapter 311 (S.F. 25) of the Laws of the Forty-ninth General Assembly, approved Feb. 17, 1941. (See Acts, Reg. Sess. 50 G. A. Iowa, 1943, Chap. 278, p. 278.) Some of the rules, including Rule 331, were amended on Jan. 24, 1945. (See Acts, Reg. Sess., 51 G. A. of Iowa, pp. 340-341.) Rule 331 took the place of Iowa Code §§ 12822-12823 (1939), the latter of which authorized an appeal "from (1) an order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken . . . ; (3) an order which . . . sustains or overrules a demurrer in a law action; or sustains or overrules a motion to dismiss in an equitable action; (4) an intermediate order involving the merits or materially affecting the final decision. . . ."

further judgment or order; reserving only such issues, if any, which remain undisposed of by such ruling and election. . . .

331. From Final Judgment.

(a) All final judgments and decisions of courts of record, and any final adjudication in the trial court under Rule 86 involving the merits or materially affecting the final decision, may be appealed to the Supreme Court, except as provided in this Rule and in Rule 333.

(b) No interlocutory ruling or decision may be appealed, except as provided in Rule 332, until after the final judgment or order. No error in such interlocutory ruling or decision is waived by pleading over, or proceeding to trial. On appeal from the final judgment, there may be assigned as error such interlocutory ruling or decision or any final adjudication in the trial court under Rule 86 from which no appeal has been taken, where such ruling, decision or final adjudication is shown to have substantially affected the rights of the complaining party.

332. From Interlocutory Orders.

(a) Any party aggrieved by an interlocutory ruling or decision . . . , may apply to the Supreme Court or any Justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted, after notice and hearing as provided in Rules 347 and 353, on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness upon trial on the merits will better serve the interests of justice. No such application is necessary where the appeal is, pursuant to Rule 331, from a final adjudication in the trial court under Rule 86.²

(b) The order granting such appeal may be on terms of advancing it for prompt submission. It shall stay further proceedings below, and may require bond.

² Cf. Minn. Stat. § 605.09 (4) (1945), *supra* p. 472; S. D. Code § 33.0701 (1939), *supra* p. 481 n. 7.

SECTION 3. JUDGMENTS UPON ISSUES OF LAW AS RES JUDICATA

GODDARD v. SECURITY TITLE INSURANCE AND GUARANTEE COMPANY

Supreme Court of California, 1939. 14 Cal.2d 47, 92 P.2d 804.

THE COURT. Upon rehearing, we hereby adopt the former opinion of this court,¹ prepared by Mr. Justice Langdon, with certain changes hereinafter appearing. The said opinion reads as follows:

"This is an action against stockholders of Metropolitan Trust Company, a corporation, to recover on their proportional liability for the debts of the corporation. The obligation arose in 1930, before the repeal of our statutory provision governing this liability. The cause of action arose out of the alleged violation by the corporation of instructions concerning the use of trust money paid to it by plaintiff.

"In 1930, Earle C. Dingwell, nephew of plaintiff, owned real estate and personal property in southern California, considered to be worth about \$1,600,000. The properties were encumbered with a number of mortgages, trust deeds and other liens, and these obligations of Dingwell, together with the claims of unsecured creditors, amounted to about \$1,000,000. The creditors were pressing for payment, and loss of the properties was imminent, when Dingwell evolved a plan to place them in trust with Metropolitan Trust Company, to hold and administer them and to pay claims. As part of the plan, Dingwell and another party interested were each to provide \$50,000 in cash. Dingwell approached plaintiff, his uncle, who resided in Philadelphia, to borrow the money, and plaintiff requested that the proposal be submitted to his legal adviser. The trust plan was accordingly presented, followed later by the completed trust indenture, setting forth certain specific terms and conditions regarding releases by creditors, clearing of most of the encumbrances except first deeds of trust, etc. This was signed and forwarded to the trust company in California on September 12, 1930. On September 24, 1930, plaintiff transferred to the company the sum of \$49,280, ear-marked 'Dingwell-Goddard Trust'. In response to requested instructions as to use of the funds, plaintiff wired the company on October 17, 1930: 'Deliver to Earle C. Dingwell funds on deposit to my credit if all conditions of trust are satisfactorily arranged.' The money was thereaf-

¹ See 83 P.2d 24 (1938).

ter expended by the trust company, but a number of the trust conditions were never performed. The trustee failed to obtain title to the personal property, permitted unauthorized encumbrances, failed to secure required releases, and in various other ways did not carry out the terms of the agreement. Ultimately the scheme failed in its object, foreclosure suits were instituted, and the properties were lost. Plaintiff was unable to recover the money lent and the security therefor having been wiped out, he brought suit.

"Two actions were commenced. The first, filed in October, 1932, in the federal District Court, was against the Metropolitan Trust Company. The complaint was framed on a theory of conversion. To plaintiff's second amended complaint, filed in March, 1933, the defendant demurred, generally and specially, on a number of grounds. The demurrer was sustained with right to apply for leave to amend. But later, when an amended complaint was tendered, the court refused to permit its filing, and on June 1, 1934, judgment was entered, in which it was ordered that the action be 'dismissed with prejudice'. Appeal was taken and the Circuit Court of Appeals, with one judge dissenting, upheld the judgment, mainly on the theory that an action for conversion would not lie under the facts alleged, and that the remedy, if any, was an action on the case, the recovery being limited to the damages proximately resulting from the alleged violation of instructions. (See *Goddard v. Metropolitan Trust Co.*, 82 F. 2d 902.) The dissenting judge considered the proposed amended complaint sufficient, and expressed himself forcefully and at length to that effect. (See 82 F. 2d 913.)

"On October 21, 1933, while this action against the corporation was pending in the Federal court, plaintiff filed the present suit against defendants, stockholders of the corporation, in the superior court of Los Angeles, alleging substantially the same cause of action with corrected pleadings. A demurrer was overruled, and the case was set to be tried November 2, 1936. In June the Circuit Court of Appeals handed down its decision, and thereupon defendants amended their answer to plead the defense of *res judicata* as a complete bar to the action. The case was tried, certain amendments were allowed to conform to proof, and the matter submitted. On May 26, 1937, the trial court gave judgment in favor of plaintiff against defendants in the total amount of \$69,842.13. Defendants appealed.

"On the merits of plaintiff's claim that the corporation violated instructions concerning the use of his money, thereby causing the loss, we see no ground for disturbing the conclusion of the court below.² . . .

² The court's discussion of this point is omitted.

"The major defense, and the only one which requires extended discussion, is that the judgment in the prior action in the federal court is *res judicata* and therefore a complete bar to the present action. To determine this point it may be desirable first to review some of the principles governing the effect of judgments of dismissal and judgments entered after the sustaining of demurrers without leave to amend.

"First, a final judgment, rendered upon the merits by a court having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between them on the same cause of action. This is the general doctrine of *res judicata*. (See 2 Freeman on Judgments, [5th ed.], sec. 627, p. 1321 et seq.; von Moschzisker, *Res Judicata*, 38 Yale L. J. 299; *Price v. Sixth Dist. Agricultural Assn.*, 201 Cal. 502 [258 P. 387]. Second, a judgment not rendered on the merits does not operate as a bar. (*Campanella v. Campanella*, 204 Cal. 515 [269 P. 433]; 2 Freeman on Judgments, [5th ed.], sec. 723, p. 1530; 34 C. J. 774, sec. 1193.) Third, a judgment based upon the sustaining of a special demurrer for technical or formal defects is clearly not on the merits and is not a bar to the filing of a new action. (2 Freeman on Judgments, [5th ed.], sec. 745, p. 1569; 34 C. J. 797, sec. 1219.) Fourth, judgments based upon sustaining a general demurrer have given rise to an apparent conflict of decision, and careful distinctions must be drawn between the cases. (See von Moschzisker, *Res Judicata*, 38 Yale L. J. 299, 318 et seq.; Clark, *Code Pleading*, p. 367.)³ A judgment given after the sustaining of a general demurrer on a ground of substance, for example, that an absolute defense is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit; and the same is true where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action. (2 Freeman on Judgments, [5th ed.], sec. 746, p. 1571; *Erganian v. Brightman*, 13 Cal. App. 2d 696 [57 P. 2d 971]; von Moschzisker, *Res Judicata*, 38 Yale L. J. 299, 318, and cases cited.) But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal,

³ Cf. Clark, *Code Pleading*, 530-531 (2d ed. 1947): "The cases seem divided between these rules: (1) No second action may be brought alleging the same facts, or negating the positive allegations made in the first action, but the omission of an essential allegation may be corrected in a second suit. (2) The judgment is an adjudication of the whole matter in dispute and concludes, not only the issues passed upon, but also those which could have arisen if the proceedings had continued. In view of the freedom of amendment now permitted, and the desirability of terminating litigation as promptly as possible, the latter rule seems preferable."

Cf. also *Gould v. Evansville & C. R. Co.*, 91 U.S. 526, 23 L. Ed. 416 (1875).

and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. (*Newhall v. Hatch*, 134 Cal. 269 [66 P. 266, 55 L. R. A. 673]; *Terry v. Hammonds*, 47 Cal. 32; *Dymont v. Board of Medical Examiners*, 93 Cal. App. 65 [268 P. 1073]; 2 Freeman on Judgments, [5th ed.], secs. 747, 748; von Moschzisker, *Res Judicata*, 38 Yale L. J. 299, 318.) This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action. (2 Freeman on Judgments, [5th ed.], secs. 734, 735; von Moschzisker, *Res Judicata*, 38 Yale L. J. 299, 318.) Fifth, an ordinary judgment of dismissal, for example, for want of prosecution, has the same effect as a nonsuit, that is, is considered not on the merits and not a bar to another suit on the same cause of action, unless the record shows that there was an actual determination on the merits. (*Everts v. Blaschko*, 17 Cal. App. 2d 188 [61 P. 2d 776]; *Matteson v. Klump*, 100 Cal. App. 64 [279 P. 669]; *Campanella v. Campanella*, 204 Cal. 515 [269 P. 433]; 2 Freeman on Judgments, [5th ed.], sec. 753, p. 1582.)

"Applying these principles to the case before us, it is apparent that the prior judgment of dismissal by the federal district court was entered primarily on two grounds, first, that the complaint was framed on a theory of conversion rather than an action on the case; and second, that it was uncertain and insufficient in its pleading of causal connection between the violation of instructions by the trustee and the resulting loss to the plaintiff. This is the necessary conclusion from a reading of the minute order of the court, as well as from a study of the opinion of the Circuit Court of Appeals, hereinabove mentioned. The actual order was merely that 'said demurrer is sustained', without expressly stating whether the grounds of special or of general demurrer were controlling. But assuming that the court was also sustaining the general demurrer, the minute order shows that it was not on a matter of substance which could not be remedied by another pleading. The court's determination amounted to nothing more than that the plaintiff had failed, in the two respects mentioned above, to establish a right of recovery against the defendant by that particular complaint. The judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not *res judicata*.

"Defendants, however, rely heavily on the argument that the federal court *intended* its judgment to be a bar, as indicated by the form of the order, which states that the action was 'dismissed with prejudice'. The contention is that the court was determined to end the litigation, that it was deciding the cause on the merits, and expressly made its decision a bar to another action by the addition of the words 'with prejudice'.

"This view is in our opinion based upon a misconception of both the power of the court and the ordinary meaning and effect of a dismissal 'with prejudice'. In the first place, if the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of *res judicata* would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of proposed order drafted by successful counsel. Suppose, for example, a complaint were filed, stating a good cause of action and sufficient in every respect except that some minor allegation appeared uncertain or ambiguous. Suppose further that a special demurrer were filed on this ground alone, and the court sustained the demurrer without leave to amend, and ordered the action dismissed. The plaintiff could appeal and doubtless have the judgment reversed. But he would not be limited to that remedy. He would be free to file a new action within the period of the statute of limitations, and a plea of *res judicata*, that is, of prior adjudication on the merits, would completely fail. Now, what difference would there be if the court in such a situation were to add the words 'with prejudice' to its order of dismissal? Such a statement, if it has any definite meaning, suggests merely that the court believed that the judgment would finally conclude the controversy. But it is the nature of the action and the character of the judgment that determines whether it is *res judicata*. The intention of the court to make a determination *on the merits* may be important, but if the judgment is clearly not on the merits, the court's intention to make it a *bar* is immaterial. The words 'with prejudice' add nothing to the effect of the judgment in such a case no matter what light they throw on the intention of the court.

"We think this is the principle underlying the case of *Matteson v. Klump*, 100 Cal. App. 64 [279 P. 669], where the court said: 'As announced by decisions of the Supreme Court of this state, the ordinary rule is that the dismissal of an action does not operate as a bar to another action for the same cause of action as was stated in the action which was dismissed . . . but specifically, where the dismissal of an action does not purport to go to the merits of the case, the trial court has no au-

thority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated.' The court then, in affirming the judgment, struck out the words 'with prejudice'. A similar result was reached in *Steffens v. Rowley*, 10 Cal. App. 2d 628 [52 P. 2d 493]. (See, also, *Lindblom v. Mayar*, 81 Wash. 350 [142 P. 695]; *Lower v. Forelich* 151 Minn. 552 [185 N. W. 940].) If the trial court has no authority to add the term 'with prejudice' to a judgment not on the merits, it necessarily follows that the unauthorized addition of this term cannot so radically change the effect of the judgment as to make it a bar even though it is not on the merits.

"In the instant case we have, therefore, a judgment of dismissal based upon a demurrer sustained for defects of form, under circumstances where it was possible to plead a good cause of action in another suit. This type of judgment, under the rules we have discussed, is not *res judicata*.

"The authorities which purport to hold that judgments of dismissal 'with prejudice' are *res judicata* are nearly all distinguishable upon careful examination. One type of case is based upon that situation where by statute or practice this kind of judgment is used after a determination on the merits, and it is a bar, not because of the use of the words 'with prejudice', but because the judgment was in fact on the merits and that form was used to describe it. (See 2 Freeman on Judgments, [5th ed.], sec. 752, p. 1581.) Other cases are concerned with dismissals by consent or stipulation of the parties, after compromise or settlement of the suit, where the dismissal is intended to operate as a *retraxit* and end the litigation. In such cases the judgment of dismissal is entered 'with prejudice' and is of course a bar to a subsequent suit. (See *Pulley v. Chicago etc. Ry. Co.*, 122 Kan. 269 [251 P. 1100]; *Morgan v. Hart*, 84 Wash. 496 [147 P. 26]; *Hargis v. Robinson*, 70 Kan. 589 [79 P. 119]; cf. *Lamb v. Herndon*, 97 Cal.App. 193, 202 [275 P. 203]; *Breznikar v. T. J. Topper Co.*, 23 Cal. App. 2d 298, 303 [72 P. 2d 895].)"

The view we take on the point just discussed makes it inappropriate to decide whether the doctrine of *res judicata* is rendered inapplicable by reason of difference in parties to the two actions. . . .

The judgment is affirmed.

Rehearing denied.⁴

⁴ See 30 Calif. L. Rev. 487 (1942); Notes, *Conclusiveness of Judgment on Demurrer*, in 13 A.L.R. 1104 (1921) and 106 A.L.R. 437 (1937); Loomis, *The Effect of a Decision Sustaining a Demurrer to a Complaint* 9 Yale L. J. 387 (1900); Cleary, *Res Judicata Reexamined*, 57 Yale L. J. 339 (1948).

NOTES

(1) *Hutchings v. Zumbrunn*, 86 Okl. 226, 228, 229, 208 P. 398 (1922): "The demurrer in the former action was upon six grounds, viz.: (1) That the court is without jurisdiction of the person of the defendant; (2) that the court is without jurisdiction of the subject-matter of the action; (3) that there is a defect in parties plaintiff; (4) that there is a defect of parties defendant; (5) that several causes of action are improperly joined; and (6) that said petition fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants. This demurrer was by the court sustained, but there is nothing in the record indicating upon which ground or grounds thereon the action of the court was based. Of course, if based upon the sixth ground, the judgment rendered thereon would be final and conclusive between the same parties and on the same facts pleaded in a subsequent action. [Citations omitted.] This for the reason that a ruling on the demurrer on this ground necessarily involved a consideration of all the facts well pleaded in the petition, and if it was determined that such facts were insufficient to constitute a cause of action, this amounted to an adjudication of the merits. On the other hand, if the demurrer was sustained on some other ground, the judgment thereon would not be conclusive. . . . We are unable to determine upon which of the grounds of the demurrer the court based its decision, and counsel for plaintiffs in error confess their inability to enlighten us in this regard; therefore, in this situation, in order to arrive at a proper decision, it becomes necessary to advert to the rule of presumption. . . . [I]t being uncertain upon which of the grounds set out the demurrer was sustained, we are justified in the presumption that the court sustained it on one of the grounds that did not involve the merits of the case, for it is but natural to suppose that if the trial court determined that it was without jurisdiction of either the person of the defendant or the subject-matter of the action, or that there was a defect of parties, either plaintiff or defendant, or that several causes of action were improperly joined, it would not proceed to an investigation of the merits, which was presented by the sixth ground of demurrer."⁵

(2) *Cf. Rutledge J.*, dissenting in *Angel v. Bullington*, 330 U. S. 183, 203-204, 67 S. Ct. 650, 91 L. Ed. 573 (1947): "It is not every case in which a litigant has had 'one bite at the cherry' that the law forbids another. In other words, it is not every such case in which the policy of stopping litigation outweighs that of showing the truth. . . . Under the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the show-

⁵ *Cf. Hadden v. Fuqua*, 194 Ga. 621, 632, 22 S.E.2d 377 (1942): "The judgment was as follows: 'The within demurrer coming on to be heard, after argument the same is hereby sustained. This July 29, 1939.' It is declared in the Code: 'If upon demurrer the court shall decide upon the merits of the cause, the judgment may be pleaded in bar of another suit for the same cause.' § 110-504. Under the language of the foregoing judgment, there is no presumption that it was based upon any particular ground of demurrer, to the exclusion of others; but it should be treated as sustaining the demurrer upon all grounds."

ing of the truth. The balance has never been so one-sided in favor of the former that the matter is ended simply by showing that a party has had some chance, however slight, in a previous litigation to secure a favorable decision. If this were the law every case where a party takes a non-suit or dismissal for the purpose of starting over again would be a final and conclusive determination against him. I know of no jurisdiction where the law has been so harsh. . . . There are too many good reasons why persons starting out in litigation should not be barred of their rights by the fact alone that they withdraw in order to start again, even though by going on to the end they might pull through successfully against great odds. Crucial witnesses may disappear or die and time be required for finding them or others. Surprise in the course of the trial may occur justifying withdrawal without fatal loss of rights. . . . Jurisdictional and other uncertainties may arise putting in jeopardy or making comparatively or completely futile further pursuit of the pending litigation when another suit in the same or a different court might provide a more certain and less expensive mode of disposing of the controversy for all the parties."

STATE v. CALIFORNIA PACKING CORPORATION

Supreme Court of Utah, 1944. 105 Utah 191, 145 P.2d 784.

WADE, JUSTICE. Plaintiff, by its petition for rehearing, raises only the question of the effect of our affirmance of the dismissal of plaintiff's complaint with prejudice. The district court sustained the demurrer to plaintiff's amended complaint; plaintiff refused to plead further; the case was dismissed with prejudice and we affirmed the judgment. *State of Utah v. California Packing Corporation*, Utah, 141 P. 2d 386. The state now contends that the dismissal of this action should not be a bar to its maintaining another action based on the facts alleged in its original complaint and asks us to so hold.

The dismissal of plaintiff's action, although with prejudice, does not bar plaintiff from maintaining another action against the defendant based on the same facts alleged in the original complaint providing the new complaint supplies new and additional facts, so that the new complaint alleges different facts and states a cause of action. The dismissal of the action is with prejudice only to the extent that it determined once and for all that the complaint attacked by demurrer did not state facts sufficient to constitute a cause of action and bars the maintenance of a new action on the same facts which were alleged in the complaint which was dismissed.¹ . . .

¹ In the omitted part of the opinion the court points out that the failure of a complaint to state sufficient facts and the plaintiff's failure to amend after it has been determined that the complaint is insufficient, do not constitute a ground for the dismissal of an action without prejudice under Utah Code Ann. § 104-29-1

It is well settled, in the absence of statutory provisions to the contrary, that where a demurrer to the complaint is sustained on the ground that it fails to state facts sufficient to constitute a cause of action, and the defendant refuses to plead further, and the court dismisses the action for that reason, such judgment of dismissal will prevent the maintenance of a new action for the same cause of action where the allegations in the two complaints are substantially the same, and no substantially material new facts are alleged in the new complaint. This is true even though the court was incorrect in holding that the original complaint did not state a cause of action. 2 Freeman on Judgments 1572, Sec. 747; *Wade v. Peters*, 89 Or. 233, 173 P. 567, 13 A. L. R. 1100, also note on this question at the end of this case in 13 A. L. R. 1104, also supplemental note on this question in 106 A. L. R. 437. On this point the courts are practically unanimous and it is clear that to that extent such a judgment is a judgment on the merits. It is usually recognized by the courts and writers that a judgment on a question of fact is *res adjudicata* of that fact in another action between the same parties, even though it does not involve the same cause of action, but on a question of law, a judgment is *res adjudicata* only in the same cause of action. See 38 Yale Law Journal (1928-29) 299, which is an article written by Robert von Moschzisker on *Res Adjudicata*; *Kellerman's Estate*, 242 Pa. 3, 88 A. 865; *Havir's Estate*, 283 Pa. 292, 129 A. 101. A judgment on demurrer determines only questions of law and not questions of fact. Although it is often said that on demurrer the demurrant admits all facts well pleaded for the purpose of the demurrer, in reality he does not admit anything but merely says: Even if everything stated in the complaint were true it does not state facts sufficient to constitute a cause of action. 38 Yale Law Journal 319.

On the other hand, it is usually held that under the facts assumed above where, in the first action, the demurrer is sustained on the ground that the complaint failed to allege some essential fact necessary to constitute a cause of action and another action is commenced wherein the essential allegation omitted in the first action is fully supplied in the second, the judgment in the first action is no bar to the second even though both suits were brought to enforce the same right and the plaintiff in the first action might have amended his complaint to include the omitted essential allegation. This for the reason that the merits of the cause as shown in the complaint in the second

(1943), and, therefore, the dismissal of an action for such reasons is a dismissal with prejudice under § 104-29-2.

action were not passed on in the first. As said in *Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 534, 23 L. Ed. 416, 419:

" . . . but it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."²

There are some cases which hold contrary and Robert von Moschzisker in 38 Yale Law Journal at page 319 criticises this rule and says: "Judgments entered under such circumstances should not only be accounted as decisions on the merits, but should bar future litigation of the same cause both as to the issues raised in the first case and also as to all issues of fact that might have been pleaded by defendant, for since he failed to take advantage of an express opportunity to state his case, the law will assume he had none to plead." Logically there is much force to his argument, but in practice it is often quite important to a litigant to know what the law is on a proposition involved in his case before he presents it to the jury. In order to do so he must plead his case so as to raise that issue, and if the trial court rules against him, then he must stand on his pleadings and take a dismissal in order to appeal to the higher court,³ but if the higher court also rules against him, and that decision on demurrer is *res adjudicata* of that cause of action, so that he cannot maintain a new action even though he alleges additional facts, then he will be deprived of the opportunity of trying his case, knowing what the law is on that subject. The better rule therefore, as well as the one sustained by the weight of authority, is that a dismissal of an action after a demurrer to complaint has been sustained and plaintiff has failed to further plead, is with prejudice to and prevents the maintenance of a new action only where the facts alleged in the two complaints are substantially the same; but the dismissal of the former action is no bar to the maintenance of a new action where the demurrer is sustained because the complaint failed to state facts sufficient to constitute a cause of action, and the necessary facts omitted in the first complaint are supplied in the second, so that the complaint in the second action does state a cause of action.

² Quotations from other cases to the same effect are omitted.

³ *Cf.* Utah Code Ann. 20-2-2 (1943): The supreme court, in the exercise of its appellate jurisdiction, "may review all final judgments of the district court. . . ."; Utah Const. Art. VIII, sec. 9: "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. . . ."

We hold, therefore, that the judgment below, heretofore affirmed, is on the merits only to the extent hereinabove indicated and the petition for rehearing is denied.⁴

DUNCAN v. DEMING INVESTMENT CO.

Supreme Court of Oklahoma, 1916. 54 Okl. 680, 154 P. 651.

Opinion by BLEAKMORE, C. This action was commenced on November 25, 1911, in the district court of Washington county, by the Deming Investment Company, as plaintiff, against James W. and John C. Duncan, as defendants, to recover upon ten promissory notes executed on divers dates in the years 1901 and 1902, all of which matured on April 1, 1906. Plaintiff alleged payment of a certain sum upon each of said notes in July, 1910, and that the defendants, the makers thereof, acknowledged the indebtedness represented by said notes in writing on July 18 and August 16, 1910, and on January 6 and January 14, 1911. Defendants answered, pleading former adjudication as follows:

"Defendants, further answering, say that the plaintiff is estopped from prosecuting this action by reason of the fact that all of the matters and things in controversy herein have been finally determined in a certain suit pending in the district court of Cherokee county, Okla., wherein the plaintiff herein was plaintiff and the defendants herein were defendants, said cause being numbered 386, and the defendants say that in the said suit the said district court of Cherokee county, Okla., had jurisdiction of the parties to this suit and had jurisdiction of the subject-matter alleged herein, and on the 18th day of September, 1911, a final judgment was rendered therein, from which the plaintiff prayed and was allowed an appeal. Defendants say that on account of the final adjudication of the cause of action involved herein as above set forth the plaintiff cannot now be heard to prosecute this action. Attached hereto as exhibits are the plaintiff's petition, the defendants' demurrer, and the court's final judgment thereon, together with the application of the defendants to withdraw appeal and the court's adverse ruling thereon; same constituting a complete transcript of the files in said cause."

⁴ The opinion of Larson, J., concurring specially, is omitted. Cf. Frankfurter, J., in *Angel v. Bullington*, 330 U.S. 183, 192-193, 67 S. Ct. 650, 91 L. Ed. 573 (1947): "The doctrine of *res judicata* is a barrier against [needlessly multiplying litigation.] Litigation is the means of vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of the law to tolerate needless litigation. Litigation is needless if, by a fair process, a controversy has once gone through the courts to a conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

Plaintiff replied, admitting the fact of former action by it against the defendants seeking judgment upon the same notes sued on herein, and the jurisdiction of the court in that action of the subject-matter and the parties and the order sustaining the demurrer, but alleged that thereafter plaintiff filed in said cause its motion to amend its petition and for an extension of time within which to amend the same, and, further, that on October 13, 1911, it filed in said cause a dismissal thereof, which it averred was the last pleading filed and worked a complete dismissal of said action.

In the former suit the petition contains ten counts declaring on the identical notes upon which recovery is sought in this action; the only difference being the failure of the former to set forth the alleged payments on the notes made in 1910 and the acknowledgment by the makers of their indebtedness thereon within the period of limitation. The judgment in the former suit recites:

" . . . The cause came on for hearing upon the demurrer filed on behalf of defendants to the petition upon the following grounds: First, that the petition upon its face shows that the notes sued upon in each count thereof are barred by the statute of limitations. . . .

"The petition herein was filed on July 31, 1911. The demurrer and the petition having been presented to the court, and the court having heard argument of counsel, both for the defendants and the plaintiff, and the court being well and sufficiently advised, and the court finding that more than five years had elapsed from the date each note should become due before the institution of the suit, the court sustains the first ground for demurrer, and orders the petition dismissed at plaintiff's cost, and overrules the second ground. The attorney for plaintiff excepted to the ruling of the court sustaining the first ground of the demurrer, and asked that his exceptions be allowed, and the attorney for the defendants excepted to the rulings of the court overruling the second ground of the demurrer, and asked that his exceptions be allowed, and the plaintiff prayed an appeal from the ruling of the court sustaining the first ground of the demurrer, and the defendants prayed an appeal upon the ruling of the court overruling the second ground of demurrer,¹ which appeal and cross-appeal was allowed by the court, and 90 days were given to each party to prepare and present a case-made, and it is so ordered."

¹ For the Oklahoma rules with respect to appeals from orders sustaining or overruling demurrers, see *supra* p. 483, note 1; *Culp v. Stat.* *supra* p. 483, note 1; *Friend v. Nabours*, 177 Okl. 428, 60 P.2d 386 (1936).

The motion of plaintiff in the first action for permission to withdraw its application for an appeal from the ruling of the court sustaining the demurrer and to amend its petition on the ground that its attorneys after the sustaining of said demurrer had learned that one of the defendants had acknowledged his liability on the notes sued on prior to the bringing of that suit and promised in writing to pay the same, and that a payment of \$23 had been made thereon in July, 1910, was overruled by the court, and later plaintiff filed in said cause what it terms a dismissal, as follows:

"Comes now the plaintiff, the Deming Investment Company, by E. L. Graves and W. E. Dunaway, its attorneys, before final submission of the cause herein, and before answer filed or cross-relief prayed, and hereby dismisses said cause without prejudice; said dismissal being under section No. 5918, Snyder's Comp. Laws of Oklahoma, this 10th day of October, 1911."

There was also introduced in the instant case evidence showing a payment of \$23 on the indebtedness evidenced by the notes in suit, made in July, 1910, a portion of which was applied by the plaintiff on each of the ten notes, and that one of the defendants acknowledged the indebtedness represented by said notes in writing in July, 1910, and in January, 1911. There was no payment upon such indebtedness or acknowledgment thereof by the defendants subsequent to the bringing of the former action in Cherokee county. The case was tried to the court, and judgment rendered for plaintiff.

In determining this cause we need to consider but one question presented by the assignments of error, *viz.*: Was the judgment of the district court of Cherokee county in the former action a bar to the present proceeding? In our opinion, it was. In the two suits the parties are the same. The action of the district court of Cherokee county was upon the identical notes involved in this suit. It is admitted that the causes of action are identical in all respects, save that in the instant suit it is alleged that certain payments upon and acknowledgments of the indebtedness evidenced by the notes were made within the period of the statute of limitation, and that such allegations were absent from the petition in the former suit in which judgment was rendered sustaining the demurrer. But such payments and such acknowledgments of the indebtedness are alleged and proved to have been made prior to the bringing of the former action; and the motion to amend, filed and overruled after the rendition of the judgment sustaining the demurrer to the petition in that action, was made in order that the plaintiff in that suit might plead these same payments and acknowledgments

of indebtedness there. If the court in that case erred in overruling such motion, the remedy was by proper application to the trial court, or by appeal. The adjudication in that case that the plaintiff's cause of action on the notes declared on in the instant case was barred, whether erroneous or otherwise, was a judgment on the merits, and, until vacated or reversed upon appeal, no act of the plaintiff alone could extinguish such judgment, render nugatory its effectiveness, or relieve it of its final and conclusive character. Plaintiff's attempt to dismiss that case after the rendition of the judgment therein upon the demurrer was a nullity, and in no way affected such adjudication or the rights of the parties thereunder. In *Pettis et ux. v. McClain et al.*, 21 Okl. 521, 98 P. 927, it is held:

"A judgment rendered upon a demurrer to a petition or complaint between the same parties and on the same facts pleaded in the subsequent action is final and conclusive until reversed on appeal, and is a bar to any subsequent action based thereon."

The court quotes with approval from Freeman on Judgments (4th Ed.), sec. 267, as follows:

"A judgment upon demurrer may be a judgment on the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the court or jury. No subsequent action can be maintained by the plaintiff if the judgment is against him on the same facts stated in the former complaint. If any court errs in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless 'on the merits'; it is final and conclusive until reversed on appeal. Until then the plaintiff cannot disregard it and maintain another action. The effect of a judgment still in force is never diminished on account of any mistake of law on which it is founded." *City of El Reno et al. v. Cleveland-Trinidad Paving Company*, 25 Okl. 648, 107 P. 163, 27 L. R. A., N. S., 650.

In *Pioneer Tel. & Tel. Co. v. State*, 40 Okl. 417, 138 P. 1033, it is held:

"A regular judgment, whilst it remains in force, is conclusive as to every matter that might have been given in evidence or pleaded to the action in which it was rendered, except matters growing out of separate and independent causes of action, which might have been pleaded in offset."

In *Prince v. Gosnell*, 47 Okl. 570, 149 P. 1162, it is held that:

"In an action in ejectment, a former judgment of a court of competent jurisdiction between the same parties and involv-

ing the same subject-matter is conclusive, not only as to every matter involved in the former case, but as to every matter which might have been pleaded or given in evidence, whether the same was pleaded or not.

"In the absence of exceptional facts excusing a failure to do so, a party should plead all the material facts that constitute his claim or defense, and a failure to do so cannot be made the basis of another action."

See *Baker v. Leavitt et al.*, 54 Okl. 70, 153 P. 1099, where the authorities are fully collated.

The judgment of the trial court should be reversed.

By the Court: It is so ordered.²

NOTE

Griffin v. Griffin, 183 Va. 443, 450, 451-452, 32 S. E. 2d 700 (1945): "In *Brunner v. Cook*, 134 Va. 266, 114 S. E. 650, this court, quoting from 15 R. C. L., sec. 438, page 962, said: "When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties." 4 A. L. R., note 1174. A general demurrer which denies the right of the plaintiff to recover on the cause of action alleged, which is sustained, is a decision on the merits. [Citations omitted.]

"The doctrine of *res adjudicata* applies as to all matters which existed at the time of giving the judgment or rendering the decree and which the plaintiff had the opportunity of bringing before the court." [Citations omitted.]

"Applying that test to the case at bar, the second suit was clearly barred by the decree in the first, for all of the facts alleged in the second suit existed when the first bill of complaint was filed. No new ground for divorce was alleged in the second suit, though there was a difference in the facts alleged. The ground in both suits was expressed as 'cruelty amounting to constructive desertion.' The appellant not only had the opportunity of bringing this ground for divorce before the court in the first suit but she had the opportunity, and it was her duty to bring before the court in the first suit any other ground for divorce that existed at that time. There was a final decree in the first cause rendered by a court of competent jurisdiction on the merits. It necessarily bars the appellant from conducting a subsequent suit involving the same cause of action.

² Cf. *Elfman v. Glaser*, 313 Mass. 370, 47 N.E.2d 925 (1941); *Buchanan v. General Motors Corporation*, 158 F.2d 728 (C.C.A. 2d 1947).

"In 30 Am. Jur., Judgments, sec. 165, the basis of the doctrine of *res adjudicata* is clearly stated:

"The doctrine of *res adjudicata* may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquillity. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of *res judicata*, would be endless. The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of *res judicata* not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings.

' " 3

³ Cf. N.Y.S. Labor Relations Board v. Holland Laundry, 294 N.Y. 480, 493-494, 63 N.E.2d 69 (1945).

BOOK II. DEFENSES IN POINT OF FACT

Chapter XII

NEGATIVE DEFENSES

SECTION 1. THE TRAVERSE AND ITS ANALOGUES

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1244-1245, 1252-1253.

The nature of an issue of fact is the same whether it occurs as the result of a negative or an affirmative defense on the part of the defendant. Other procedural consequences may be different, such as the incidence of the burden of proof, but the issue is in either case constituted by a contradiction. It is here that certain grammatical and logical considerations underlie the process of pleading. Individuals can contradict each other in one of two ways which are formally interchangeable. If A affirms the proposition X is Y, B can contradict him either (1) by denying the proposition X is Y or (2) by affirming the proposition X is not Y. The two propositions X is Y and X is not Y, are related as contradictories. To deny one of a pair of contradictories is the same as to affirm the other.¹ For any given proposition, there must be a related proposition which is its contradictory, and there can be only one contradictory for each proposition. The precision of an issue of fact depends upon the nature of contradiction as perfect opposition. . . .

An issue of fact is now seen to be constituted by a material proposition and its contradictory.² The allegation of a material proposition does not necessarily result in an issue for the following reasons: (1) the proposition may be judicially noticed and hence indisputable, (2) the proposition may not be disputed,

¹ It will be noted that where we are talking about disputes in general we use the words "affirm" and "deny," whereas we use the words "allege" and "traverse" to indicate disputes involved in litigation. The reason for this will become clear subsequently when we understand the logical status that assertion confers upon a proposition. It will then be seen that to allege and to traverse a proposition is not to give it this status, but merely to claim that the proposition should be given the status in question. Nevertheless, to traverse a proposition is the same as to allege its contradictory, although in legal practice it is not so viewed because of the need to distinguish negative and affirmative defenses and because of the way in which the burden of proof is placed.

² The contradictory of an immaterial proposition is, of course, immaterial. An issue constituted by an immaterial proposition and its contradictory does not lead, upon resolution, to any legal consequences; and, therefore, it is never knowingly submitted to trial.

that is, it may be conceded by the opponent expressly or by his failure to traverse it. A trial becomes necessary if a single issue of fact occurs in the pleadings, that is, if at least one material proposition is traversed, whether one which is alleged by the plaintiff or one which is the matter of an affirmative defense. The determination of what propositions must be alleged to constitute a cause of action, or what propositions can be alleged in affirmative defense, is ultimately a question of law which does not concern us here. We need only consider propositions whose materiality is not questioned. Those which are involved in a given case are so involved either by allegation or by judicial notice or both; of those alleged, only those not judicially noticed can be traversed; and of those, not all may be traversed, since some may be conceded. Material propositions which are judicially noticed or which are conceded have the status of propositions asserted to be true. . . .

NOTE

Hill v. Smith, 27 Cal. 476, 479-480 (1865): "The objection to the form in which many of the allegations contained in the complaint are denied is not a substantial one, in our judgment. Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant at a certain time made and delivered to the plaintiff his certain promissory note, etc. Is not this allegation as directly and fairly traversed by saying: 'I did not, at the time specified, or at any other time, make or deliver to the plaintiff the note described in the complaint,' as by saying: 'I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint'? We think both serve equally well to form the issue. The former mode (which is the one adopted in this case) is less usual than the latter, but we are unable to perceive why it is not equally as good. It matters but little which form is adopted. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed."³

NOTE ON THE BACKGROUND OF THE CODES

Just as the common law demurrer is the prototype of all procedural devices for interposing defenses in point of law, so

³ Cf. Nesbitt v. DeMasters, 44 Idaho 143, 146-147, 255 P. 408 (1927): "The whole case turns on the question whether or not the district owned a school site. The complaint stated it had one. The return [to an alternative writ of mandamus] stated that it had none. . . . Such language constitutes a denial of the strongest sort. It is not necessary that a traverse be expressed in negative words. The averment of the contrary of what is alleged in the complaint is equivalent to an ordinary denial." Cf. also Whetsell v. Sovereign Camp, W.O.W., 188 S.C. 106, 123, 198 S.E. 153 (1938): "We know of no rule of pleading which requires that a defendant must say in specific language 'I deny' this and that allegation of the complaint."

the common law plea is the prototype of all procedural devices for interposing defenses in point of fact. There were two species of pleas, peremptory pleas and dilatory pleas; and the difference between their functions was analogous to the difference between the functions of the general demurrer and those of the special demurrer. That is to say that peremptory pleas, or pleas in bar or to the merits as they were also called, interposed defenses in point of fact based upon substantive grounds and dilatory pleas interposed defenses in point of fact based upon procedural or formal grounds. As Keigwin put it,¹ "a peremptory plea is one which shows some ground for barring or defeating the action, and which (if valid and proved) will prevent recovery at any time or in any form upon the cause of action alleged. A dilatory plea is one which, not denying the plaintiff's right to recover, alleges some fact which renders it impossible for him to recover in the action which is brought."

Peremptory pleas were divided into pleas by way of traverse and pleas by way of confession and avoidance, and dilatory pleas, into pleas to the jurisdiction of the court, pleas in suspension of the action, and pleas in abatement.² The plea by way of traverse was the device for interposing negative, and the plea by way of confession and avoidance was the device for interposing affirmative defenses in point of fact.³ The traverse is the prototype of all procedural devices for interposing negative defenses and the plea in confession and avoidance is the prototype of all procedural devices for interposing affirmative defenses.

There were three sorts of traverse, the specific or common, the special, and the general, but the special now has only anti-quarian interest and need not concern us.⁴ The specific traverse was one which *explicitly* denied⁵ one or more but less than all of the material allegations of the declaration. As we shall see,

¹ Cases in Common Law Pleading, 674 (2d ed. 1934).

² According to Keigwin (*op. cit.*, at 674-676), pleas to the jurisdiction stated some reason why the court was not competent to entertain the cause; pleas in suspension of the action, some reason of a temporary character why the plaintiff, although possibly entitled to recover, might not prosecute his right until that reason, such, for example, as that he is an alien enemy, should cease to exist; and pleas in abatement, some reason, relating to the manner in which the action was brought or the circumstances in which it was brought, why the plaintiff might not maintain his action, such, for example, as that he was an infant or that he had brought and was prosecuting another suit for the same cause of action.

For fuller discussions of peremptory and dilatory pleas, see Shipman, Common Law Pleading, 29-30 (3d ed. 1923); Martin, Civil Procedure at Common Law §§ 244-252, 256 (1905).

³ Although, as we are about to see, the form of traverse known as the general issue might also be used to interpose some affirmative defenses in some forms of action.

⁴ For an explanation of this sort of traverse, see Martin, *op. cit. supra*, at § 259; Keigwin, *op. cit. supra*, at 644 ff.; Shipman, *op. cit. supra*, at 366 ff.

⁵ Cf. Martin, *op. cit. supra*, at § 257: "Denial and traverse are synonymous terms."

it might not be used to deny all, because that was the function of the general traverse. As Her Majesty's Commissioners put it,⁶ this was "in its shape, a summary form of denial of the allegations in the declaration or some principal part of them." "It differed from the specific or common traverse," according to Martin⁷, "in that its denial was not in the specific language of the declaration, but in some general compendious phrase [such as "not guilty" in trespass and case, "non assumpsit" in assumpsit and indebitatus assumpsit, "nil debet" in debt on simple contract, and "non est factum" in debt on specialty and covenant], which came to be regarded as putting in issue all the material allegations of the declaration or the principal fact upon which it was founded." The resulting issue was known as the general issue because of its comprehensive character, and the plea itself came to be called by that phrase.

By "relaxation of principle" the general issue came to be employed in some forms of action as a device for interposing affirmative as well as negative defenses. "Under this plea," Her Majesty's Commissioners said,⁸ "a defendant is at present allowed in certain actions, to put the plaintiff to the proof of every thing alleged in the declaration, and in some, not only to do this, but at the same time to prove in his own defence, almost any kind of matter in confession and avoidance; that is, matter, which admitting the truth of the plaintiff's allegations, tends to repel or obviate their effect. On the other hand, there are some kinds of action in which, if the defence consists of matter in confession and avoidance, it must be specially pleaded, and cannot be admitted in proof under the general issue; and there are others, in which properly speaking, there is no general issue, and in which all the pleading may be considered as special."⁹ This is to say that the scope of the general issue was not the same in the various forms of action in which it might be used. In some it was taken as denying all of the material allegations of the declaration and in others, only the "principal" one or ones. In some, it was regarded as implicitly interposing all possible affirmative defenses to the action and in others, as interposing none. These differences in the scope of the general issue can be illustrated by reference to two cases.

⁶ For Inquiring Into the Practice and Proceedings of the Superior Courts of Common Law, at p. 44 of their Second Report (1830).

⁷ *Op. cit. supra*, at § 258.

⁸ *Op. cit. supra* n. 6, at 44.

⁹ *Cf. Keigwin, op. cit. supra* n. 1, at 594: "As defined by Mr. Stephen, [special pleading] is the pleading of any plea which is not a general issue; which definition includes the use of the common traverse within the scope of special pleading. Other authorities define the phrase as equivalent to pleading in confession and avoidance; and this is probably the sense in which the term is generally understood."

Chicago Title and Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108 (1906), was an action of *trespass* in which plaintiff sought to recover damages from defendant because, as plaintiff claimed, defendant by its agents wrongfully entered plaintiff's hardware store and seized and thereafter sold plaintiff's stock. Defendant pleaded not guilty. The evidence disclosed that after some discussion between defendant's agents and plaintiff which occurred after they entered his place of business, he surrendered the keys to the store to them. Defendant thought that this evidence established the affirmative defense known as "leave and license." Defendant therefore requested the judge to instruct the jury that they should find defendant not guilty if they believed, from the evidence, that plaintiff "voluntarily delivered possession of the property upon the demand" of defendant's agents. The judge refused to do so, and the trial resulted in a judgment for plaintiff. Upon defendant's appeal from that judgment the court held that the judge correctly refused to charge as requested. The court said (at p. 62): "The only plea was not guilty, which operated only as a denial of the wrongful taking. The plea of not guilty in trespass is a simple denial of the facts alleged in the declaration and controverts the truth of such allegations as the plaintiff is bound to prove, and no more. The acts of the attorney and agent of appellant *prima facie* constituted a trespass, and matters of justification or excuse for such acts could not be proved under the plea of not guilty."

Ridgley v. Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235 (1899), was an action of *trespass on the case*, in which plaintiff sought to recover damages from defendant because, as plaintiff claimed, defendant injured his land by changing the grade of the street on which it abutted without his consent. Defendant pleaded not guilty. At the trial the judge excluded evidence, offered by defendant to establish the defense of leave and license, that at the time the grade of the street was changed, plaintiff agreed that if defendant would put tiling in a certain culvert he would accept it in lieu of damages, and that defendant did so. Upon defendant's appeal from a judgment for plaintiff, the court held that the exclusion of the evidence was erroneous. The court said in substance, partly by quoting others, that while a special plea is required in trespass if a defendant seeks to confess and avoid, in case the general issue not only puts all of the material allegations of the declaration in issue but entitles the defendant to give in evidence any matter in justification or excuse of the wrongful act with which he is charged or which, like a former recovery or a release or an accord and satisfaction, operates in discharge of the cause of action. "Thus, a license

which in trespass must be pleaded may in case be given in evidence under 'not guilty.'"

To take one other example, the scope of the general issue was as broad in *assumpsit* as in case. As the court pointed out in *Seff v. Brotman*, 108 Md. 278, 70 A. 106 (1908), while "on strict principle" the general issue, *non assumpsit*, operates only as a denial of the express promise or contract, if one is alleged, or, if none is alleged, of the facts alleged as the basis of an implied promise, "by an early relaxation of principle" defendant was permitted to adduce any evidence which showed that he was under no legal liability to plaintiff. "[T]he defendant, under this issue," the court said, "may give in evidence any matters, showing that the plaintiff *never had* any cause of action; such as, the non-joinder of another promisee; the defendant's infancy; lunacy; drunkenness, or other mental incapacity; coverture at the time of contracting; duress; want of consideration; illegality; release or parol discharge or payment before breach; material alteration of the contract; that the plaintiff was an alien enemy at the time of contracting, or that the contract was void by statute, or by the policy of the law; non-performance of condition precedent by the plaintiff; or, that performance on his own part was prevented by the plaintiff, or by law, or, in certain cases, by the act of God; or any like manner of defense."

It was a rule of common law pleading that a plea which amounted to the general issue was bad, and two sorts of pleas were thought to amount to the general issue, (1) a specific traverse which denied all of the allegations which would have been put in issue by the general traverse and (2) the so-called argumentative denial, that is, a plea which, instead of explicitly denying an allegation in its own language, alleged a proposition either contradictory of ¹⁰ or inconsistent with that allegation. Thus, in *Calloway v. Lankford*, 4 Boyce 490, 491, 90 A. 43 (Del. Super. Ct. 1914), which was an action of trespass to recover the value of a horse, alleged to be plaintiff's property and to have been wrongfully taken by defendant, the court held that defendant's plea that the horse was defendant's property was bad as amounting to the general issue. So, too, in *Kimball v. Boston, Concord & Montreal Railroad Company*, 55 Vt. 95, 97 (1882), the court said: "Instead of pleading the *general issue*, the defendant may, in some cases, effectually answer the declaration by a *special issue* [traverse], i.e., by *directly* denying some one material and traversable allegation in the declaration. . . . But such a plea never advances new matter. . . . But when the de-

¹⁰ Of course, no argument or inference is needed to reveal that two propositions are related as contradictories.

fence consists of matter of *fact* merely in *denial* of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a special plea in bar is bad as amounting to the general issue. Such is the character of these pleas. The declaration alleges a consideration for carrying the plaintiff. On trial on the general issue, the plaintiff would be bound to prove this allegation as one of the essential elements of recovery. . . . The pleas, in an indirect way, deny this allegation by advancing new matter, showing a contract contradictory to that stated in the declaration. They have no semblance to special issues [traverses], either in form or substance."

The reason commonly given for prohibiting argumentative denials was that they tended to prolixity of pleading and therefore to unnecessary expense.

On the other hand, as the court pointed out in the Kimball case, there was thought to be "a great distinction between the case of a plea that amounts to the general issue and a plea that discloses matter that may be given in evidence under the general issue." A plea of the latter sort, unlike the argumentative denial, was a genuine plea in confession and avoidance.¹¹ If the affirmative defense alleged by the plea was one which defendant might have proved had he pleaded only the general issue, the plea obviously "disclosed matter that may be given in evidence under the general issue," but it was nevertheless not bad as amounting to the general issue. That is to say that in those forms of action in which affirmative as well as negative defenses might be interposed by the general issue, it was optional with the defendant to interpose them by that plea or by a special plea or pleas. This is illustrated by *Page v. Prentice*, 7 Blackf. 322 (Ind. 1844), which was an action in debt on a promissory note and in which defendant pleaded payment specially. The court held that the plea was not bad as amounting to the general issue, although it disclosed matter that might have been given in evidence under the general issue, since it admitted the truth of the declaration.

The broad scope of the general issue in some of the actions led Her Majesty's Commissioners to criticize it severely. "Con-

¹¹ Cf. *Thayer v. Brewer*, 15 Pick. 217, 219 (Mass. 1834): "This is the test, whether a plea in bar is bad as amounting to the general issue; if it be any matter of defence which denies what the plaintiff, on the general issue, would be bound to prove, it may and ought to be given in evidence under the general issue, and a plea setting up such facts negatively is bad on special demurrer; but if it be any ground of defence which admits the facts alleged in the declaration but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, it may be specially pleaded."

sisting, as that plea does," they said¹² "of a mere summary denial of the case stated by the plaintiff, and giving no notice of any defensive allegation on which the defendant means to rely, it sends the whole case on either side, to trial, without distinguishing the fact from the law, and without defining the exact question or questions of fact to be tried. It not unfrequently, therefore, happens, that the parties are taken by surprise, and find themselves opposed by some unexpected matter of defence or reply, which from the want of timely notice, they are not in due condition to resist. But an effect of more common, and indeed almost invariable occurrence, is the unnecessary accumulation of proof, and consequently of expense; for as nothing is admitted upon the pleadings, each party is obliged to prepare himself, as far as it is practicable, with evidence upon all the different points which the nature of the action can by possibility make it incumbent upon him to establish, though many of them may turn out to be undisputed, and many of them may be such, as his adversary, if compelled to plead specially, would have thought it undesirable to dispute."

Consequently, although the Commissioners recognized that the system of special pleading was itself subject to just criticism as tending to prolixity of allegation, excessive subtlety and an overstrained observance of form, they entertained "no doubt of the expediency of making such alterations in the existing practice, as will introduce special pleas in almost every case, and in some actions abolish altogether the use of the general issue." They therefore recommended that the scope of the general issue, in so far as retained, should be greatly restricted, and this was done by rules of court, known as the General Rules of Hilary Term, 1834, which were promulgated pursuant to the authorization contained in 3 & 4 Wm. 4, c. 42, § 1.¹³ But, on the whole, the Rules did not work well in practice in the opinion of other Commissioners of Her Majesty who some years later examined the system of pleading which they created.¹⁴ They were of the opinion that the Rules had worked well in a number of respects: They had made for a more uniform and consistent system of pleading; in all cases in which issues of fact were raised, much expense had been spared by the accurate definition of the questions in dispute and in consequence of facts being admitted; and in many instances where the question turned upon

¹² *Op. cit. supra* n. 6, at 500.

¹³ For these Rules, see Stephen, Pleading, *lvi-*lix (Williston's ed. 1895); and for a discussion of them, see Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts*, 6 N.Y. U.L. Rev. 95 (1929).

¹⁴ First Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Courts of Common Law (1851).

a point of law they had made possible "the much less expensive appeal to the Court in the first instance, without the intervention of a jury to try facts which were never disputed." But the Commissioners were also of the opinion that "when the new rules compelled the use of special pleas in [assumpsit, debt on simple contract, and trespass on the case, (which constitute a very large majority indeed of all the actions which are brought)], the technical and formal defects of the system [of special pleading], which previously had existed in some actions only, became extended to all, and the inconvenience was increased in proportion. Special demurrers for want of form, and for objections of a technical nature, were very much increased. From the necessity of specially pleading all defences to actions in most general use, new pleas were introduced; and defendants who had no real defence availed themselves of the chance of a temporary success by pleading subtle and tricky pleas to invite special demurrers for the mere purpose of delay." The Commissioners therefore concluded that while a great gain in point of certainty and distinctness had been introduced by the new Rules, they had increased the opportunities for captious objections.¹⁵ The Commissioners accordingly proposed certain remedies whereby they hoped to retain these advantages without the concomitant inconveniences, and their proposals were adopted by the Common Law Procedure Act of 1852.¹⁶ Finally, the plea of the general issue was abolished in England by the Supreme Court of Judicature (Amendment) Act of 1875.¹⁷

According to Keigwin¹⁸ the Hilary Rules were never adopted as a body in any of the United States, but by rules or statutes or without either "particular changes in practice, following the English prescriptions," were made in some of the states.¹⁹

¹⁵ Cf. Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 Camb. L. J. 261 (1923), expressing the opinion that the new Rules, "on the whole, tended to aggravate the existing evils of the common law system of special pleading, by making special pleading compulsory where before it had been only optional."

¹⁶ 15 & 16 Vict., c. 76.

¹⁷ 38 & 39 Vict., c. 77, § 16.

¹⁸ *Op. cit. supra* n. 1, at 500.

¹⁹ Cf. *Ahren v. Willis*, 6 Fla. 359, 364 (1855): "We have adopted these new rules . . . so far as they are applicable to our system of jurisprudence. . . ."; and *Alliance Trust Co. v. Nettleton Hardwood Co.*, 74 Miss. 584, 594, 21 So. 396 (1896): "[W]e do not think that the Hilary rules are themselves in force with us. Not guilty, with us, as at common law, does not admit in trespass the possession, or in trespass *de bonis* or trover the property in the plaintiff."

TENNESSEE CODE ANNOTATED (1934)

8765. General Issue.—The defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue.¹

8766. In All Cases.—He may plead such general plea, whether such plea would have been good heretofore or not.

8767. Or Defendant May Plead Specially.—Or he may on motion of plaintiff, entered of record, be ordered to plead specially his defenses, in which case he shall state the facts relied on, truly, and briefly as may be, and no matter of defense not pleaded shall be shown in evidence; and to such special plea the plaintiff shall reply, and the pleading shall proceed to issue.²

8758. Plea Must State Facts.—A plea shall, in all cases, contain a succinct statement of the facts relied on as a defense to the action, except in the cases provided for in sections 8765–8767.

8759. Defendant May Plead Any Number of Pleas.—The defendant may plead as many pleas as he has real grounds of defense.

8761. Pleas to Be Sworn to.—All pleas which deny the execution or assignment by the defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of the suit whether produced or alleged to be lost or destroyed, and all pleas since the last continuance,³ shall be sworn to.

¹ Cf. *Railroad v. Conk*, 58 Tenn. 575, 576 (1872): "Under our laws the defendant has his election, to plead in either of two modes—that is, in the form used at common law, or under sections 2193-2195 [now sections 8765-8767, Tenn. Code Ann. (1934)], he may plead a general denial and give notice of his real defenses." Cf. also *Hammet v. Vogue, Inc.*, 179 Tenn. 284, 165 S.W.2d 577 (1942): "When the declaration was filed the defendants pleaded the general issue of not guilty; whereupon, plaintiff moved the court to 'require the defendants to plead their defenses specially.' The motion was granted and defendants filed their special pleas."

² Cf. Miss. Code Ann. § 1480 (1942): "Notice of special matter under general issue.—If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and to which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial."

³ For an explanation of this plea, also known as a plea puis darrein continuance, see Shipman, *Common Law Pleading*, 360-362 (3d ed. 1923).

8763. But Denial May be Formal, When.—Where the plea is required to be sworn to, if the defendant cannot admit or deny the fact for want of sufficient knowledge, he may state his want of knowledge, and thereupon make the denial necessary to present the defense.

8762. Allegations not Denied Taken as True.—All substantive allegations in the declaration, not denied in the plea, shall be taken as true for all the purposes of that issue.

NEW YORK CIVIL PRACTICE ACT

§ 260. Defendant's Pleading. The only pleading, on the part of the defendant, is an answer.

§ 261. Contents of Answer. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.¹

2. A statement of any new matter constituting a defense or counterclaim.

§ 255-a. Items of claim may be included in pleadings in actions involving the sale and delivery of goods, or performing of work, labor and services. In any action involving the sale and delivery of goods, or the rendering of work, labor or services, or the furnishing of materials, the plaintiff may, in a schedule attached to and forming part of his verified complaint, set forth and number the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer must indicate specifically the items, if any, which he disputes in respect of delivery, or performance, reasonable value, or agreed price.

§ 248. Verification of Pleading Generally. Where a pleading is verified, each subsequent pleading, except the general answer of an infant by his guardian ad litem and except as otherwise specially prescribed by statute, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would

¹ For examples of other statutes providing that denials may be either general or specific, see Vt. Pub. Laws § 1574 (1933); Idaho Code Ann. § 5-612 (1932); Ohio Code Ann. § 11134 (1940); S. C. Code Ann. § 467 (1942). Some statutes permit general denials only if the complaint is not verified. See, e.g., Cal. Code Civ. Pro. Ann. § 437 (1946).

be privileged from testifying as a witness concerning an allegation or denial contained in the pleading.²

§ 276. Construction of Allegations in Verified Pleadings. The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

ILLINOIS PRACTICE ACT¹

§ 40. (Pleadings to Be Specific.) (1) General issues shall not be employed, and every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.²

(2) Every allegation, except allegations of damages, not explicitly denied shall be deemed to be admitted, unless the party shall state in his pleading that he has no knowledge thereof sufficient to form a belief, and shall attach an affidavit of the truth of such statement of want of knowledge, or unless the party has had no opportunity to deny.³

(3) Denials must not be evasive, but must fairly answer the substance of the allegation denied.⁴

² See also N. Y. Civ. Prac. Act §§ 249-253, 276; N. Y. R. Civ. Prac. 99-100, 117.

¹ 18 Jones Ill. Stat. Ann. 104.040 (1935). In the comment of the draftsman of the Act upon this section it is stated [Ill. Prac. Act Ann. 85 (1933)]: "The substance of this section is contained in New Jersey Laws, 1912, c. 231, rules 20 and 33, and in Order 19, rules 17 and 19, of the English Rules of Supreme Court."

² In the comment upon this section it is also stated [Ill. Prac. Act Ann., 85 (1933)]: "For the purpose of better notice to the adversary, and for the purpose of formulating in advance of trial clear and distinct separate issues, the general denial is eliminated. Bulk denials are not so likely to be truthful as specific denials, where attention must be given to each item." For other examples of statutes or rules requiring denials to be specific, see 8 Mass. Laws Ann. c. 231, § 25 (1933); Iowa R. Civ. Pro. 72; Mich. Ct. R. 23, sec. 2.

³ In the comment upon this section it is also stated (*op. cit. supra*, at 85-86): "At common law the common way to avoid the effect of an admission was to interpose a denial, whether the fact were true or not, or an issue, whether it was known whether it was true or not. The denial formed an issue, but often not a truthful issue. To encourage truth in pleading, and to avoid all fictions possible, a defendant not having knowledge sufficient to form a belief may so state under oath, thus putting opponent to his proof."

⁴ The comment upon this section states (*op. cit. supra*, at 86) that this language "is particularly aimed at the type of denial generally termed a negative pregnant."

(4) If a party wishes to raise an issue as to the amount of damages only, he may do so by stating in his pleading that he desires to contest only the amount of the damages.

§ 41. (Untrue Statements.) Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be summarily taxed by the court at the trial, as may have been actually incurred by the other party, by reason of such untrue pleading.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading. . . .

(b) Defenses: Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Rule 11. Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is

not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

APPENDIX OF FORMS TO FEDERAL RULES OF CIVIL PROCEDURE¹

Form 20. —Answer Presenting Defenses Under Rule 12 (b)²

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted. . . .

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

MICHIGAN COURT RULES³

RULE 23

Answers at Law and in Equity.

Sec. 2. Every answer shall contain an explicit admission or denial of each allegation in the declaration or bill of complaint as to which the defendant has knowledge or belief. But as to matters charged in the declaration or bill as to which the defendant avers he has no knowledge or information sufficient to form a belief, he shall not be required to admit or deny the same but shall state his want of such knowledge. Every material allegation in the declaration or bill to which the defendant shall not make answer shall be taken as admitted by the defendant. In connection with every denial, the answer shall set forth the substance of the matters which will be relied upon to support

¹ Fed. R. Civ. P., 84, provides: "The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate."

² For this rule, see *supra* p. 374.

³ Adopted Oct. 12, 1944, effective Jan. 1, 1945. Mich. Comp. Laws, pp. 1404, 1415 (Mason Cum. Supp. 1945).

such denial. When an unverified bill of particulars is filed with any of the common counts, the answer shall deal with the items therein set forth in the same manner as though they were alleged in the declaration.

RULES OF NEW JERSEY COURT OF CHANCERY

49. Allegations or denials, made without reasonable cause, and found untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading.¹

50. Every material allegation of fact in a pleading, which is not denied by the adverse party, is deemed to be admitted (except as against an infant, or person of unsound mind) unless such adverse party avers that he has no knowledge or information thereof sufficient to form a belief.²

57. A denial must not be evasive, but must fairly meet the substance of the allegation denied; thus, if payment of a certain sum be alleged, when in fact less was paid, the pleader must not deny payment generally but must state how much was paid; and where any fact is alleged with divers circumstances some of which are untruly stated, the denial must not be of the fact as alleged, but so much as is true and material must be admitted and the rest only denied.³

58. Express admissions and denials must be direct, precise, specific, and not argumentative, hypothetical, or in the alternative; accordingly, when a pleader wishes expressly to admit or deny a portion only of a paragraph he must recite that portion; except that where a recited portion of a paragraph has been either admitted or denied the remainder of the paragraph may be denied or admitted without recital.

Admissions or denials of allegations identified only by a summary or generalization thereof or by describing the facts alleged as "consistent" or "inconsistent" with other facts recited or referred to, are improper.⁴

67. The answer must specifically admit, or deny, or explain, the material facts as stated in the bill of complaint un-

¹ N. J. Sup. Ct. R. 33 is identical with this Rule.

² Sup. Ct. R. 34 is identical with this Rule.

³ Sup. Ct. R. 46 is identical with this Rule.

⁴ Sup. Ct. R. 47 is identical with this Rule.

less the defendant has no knowledge or information sufficient to form a belief, and so states.

No general denial of all the averments of the bill is permissible.⁵ . . .

NOTE ON CONTEMPORARY PROCEDURAL DEVICES FOR INTERPOSING NEGATIVE DEFENSES

These devices, as the above statutes and rules indicate, are the general issue, the general denial and the specific denial. The general issue may still be employed in a few jurisdictions, although in somewhat modified form, but in the so-called code jurisdictions negative defenses may be interposed only by means of the general denial and the specific denial. In most of the code jurisdictions, for example, New York, both the general and the specific denial may be used for that purpose; in the remaining ones, Illinois, for example, only the specific denial is available.

The general denial is a denial of each and every allegation of a pleading, a complaint, for example, or of some division of the pleading, such as designated paragraphs of the pleading.¹ As Pomeroy says,² "The form in common use is, 'The defendant, for answer to the complaint herein, denies each and every allegation thereof.'" And as Clark says,³ "where this common form has been departed from,⁴ courts have varied in upholding attempted general denials." He criticises most of the decisions holding such answers insufficient as "excessively technical."⁵ However, it is the part of prudence to adhere to the form in common use.

There is a mode of denial, often called a qualified general denial, which is explicitly authorized by the provisions of some of the codes, such, for example, as the provision of Federal Rule 8(b), *supra*, that a party "may generally deny all the averments except such designated averments or paragraphs as he express-

⁵ Sup. Ct. R. 58 is similar.

¹ Cf. Cal. Code Civ. Pro. § 437 (Deering, 1941): "The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint." This provision was recently applied in *Edgar v. Foster*, 48 Cal. App. 2d 580, 120 P.2d 134 (1941). Cf. *Miller v. Cunningham*, 71 Or. 518, 520, 139 P. 927 (1914); *Ochs v. Reynolds*, 155 Pa. Super 469, 38 A.2d 728 (1944).

² Code Remedies, § 504 (5th ed. 1929).

³ Code Pleading, 584 (2d ed. 1947).

⁴ As by denying "all" instead of "each and every" allegation, or "each and every material allegation." Cf. *Mattison v. Smith*, 19 Abb. Pr. 288 (N. Y. Sup. Ct., Gen. Term, 1863); *Nix v. Gilmer*, 5 Okl. 740, 747-748, 50 P. 131 (1897); *James v. Kansas City Gas Co.*, 325 Mo. 1054, 1073, 30 S.W.2d 118 (1930).

⁵ *Op. cit. supra*, at 585. He there says: "If the form used is uncertain, or perhaps seriously cumbersome, the proper remedy would seem to be a motion to make more definite and certain. Lacking such motion, the answer ought to suffice to put the complaint in issue."

ly admits," or the provision of the California Civil Code⁶ that "the denials of the allegations controverted may be stated . . . by express admission of certain allegations of the complaint with a general denial⁷ of all the allegations not so admitted." The qualified general denial, as Clark points out, is used by a defendant who wishes to deny most but not all of the allegations of a complaint, and he regards its use as highly desirable from the viewpoint of simplicity and clarity. And according to him, it is generally approved, provided that it definitely specifies what allegations are admitted.⁸

It is to be observed that Federal Rule 8(b), *supra*, in effect prohibits the use of the general denial "unless the pleader intends in good faith to controvert all the averments of the preceding pleading." *Colbach v. Aviation Credit Corporation*, 64 Ariz. 88, 166 P. 2d 584 (1946), illustrates how such a rule is applied. Arizona Rules 8(b) and 11 are identical with the Federal Rules bearing the same numbers, and Arizona Code Ann. § 21-412 (1939) requires that an answer denying the execution by a defendant of an instrument in writing, upon which a pleading is founded, be verified. The *Colbach* case was an action in which plaintiff sought to recover a balance which, it claimed, defendant owed it on certain promissory notes, and to foreclose a chattel mortgage securing the indebtedness. Defendant filed an unverified answer by which he denied "generally and specifically each and every allegation in said complaint contained." On plaintiff's motion the trial court rendered judgment in its favor on the pleadings. On appeal defendant contended that his unverified general denial raised an issue as to the alleged balance due and, hence, that the court erred in granting plaintiff's motion, but the supreme court affirmed, saying: "A general denial is good only if the pleader intends to controvert all averments of the preceding pleading. Clearly the pleader, by the unverified general denial, did not intend to controvert the execution of the notes and mortgage mentioned in the complaint nor the equitable relief prayed for. These features were, under the law, deemed confessed, and since the general denial is good only

⁶ Section 437.

⁷ Clark calls this type of denial a "mongrel" type. He says that it is not an "ordinary" general denial because it does not put the whole complaint in issue, or an "ordinary" specific denial because it does not specifically deny each of the allegations which it controverts. *Op. cit. supra*, at 586.

⁸ *Op. cit. supra*, at 586-587. *Cf. Fischer v. Hobbs*, 177 App.Div. 653, 654-656, 164 N.Y.S. 623 (1917), in which an answer which denied "each and every allegation of paragraphs Fourth, Fifth and Sixth of the said complaint, except as hereinafter expressly admitted or alleged", was held bad, with *Griffin v. Long Island Railroad Co.*, 101 N.Y. 348, 354-355, 4 N.E. 740 (1886), in which an answer which denied "each and every allegation of the complaint not hereinabove admitted or controverted," was held good.

if it operates as a denial of all material allegations, it must, under rule 8(b) be treated as nugatory, and under rule 11, considered as if it had never been served. This being so, no issue as to the net balance was raised.”⁹

The specific denial is the analogue of the common-law specific or common traverse, which is to say that it is the denial of a definite allegation. For example, if a plaintiff alleges that the defendant struck him and the defendant wishes to deny that allegation specifically, he may do so by answering: “The defendant denies that he struck the plaintiff.” This exhibits the usual form of a specific denial; the content of such a denial will depend upon that of the allegation which it denies and which it must somehow identify. As the court said in *Seward v. Miller*, 6 How. Pr. 312 (N. Y. Sup. Ct. 1852), a denial “cannot be specific without mentioning by some particular mark of distinction the allegation which it is designed to controvert.” It is obvious that while an answer can contain only one general denial it can contain many specific denials.

In jurisdictions in which negative defenses may be interposed only by means of the specific denial, it has been held that a general denial is ineffectual to create an issue. For example, section 126 of the Kentucky Civil Code of Practice provides: “Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed. . . .” In *Stokes v. Commonwealth*, 286 Ky. 391, 150 S. W. 2d 892 (1941), defendants answered: “Defendants for answer to the petition herein deny each and every allegation in paragraphs 1 to 244 (setting them out numerically) of the petition herein as fully and to the same extent as if copied herein.”¹⁰ The court said (286 Ky. 393, 150 S. W. 2d 892) that “a denial of ‘each averment of the petition’ contains no answer whatever,”¹¹ and therefore held that the trial court properly rendered a default judgment against defendants.¹²

As we have seen, if by “facts” are meant particular things and events and their particular characteristics, a pleader cannot state facts in a pleading; he can state only his knowledge

⁹ Cf. 1 Moore, Federal Practice, 562 (1938): “Seldom will a party ever be able to use a general denial in good faith. More often a qualified general denial will be in order.”

¹⁰ Cf. Clark, *op. cit. supra* n. 3, at 587: “It is generally sufficient [as a specific denial] to state that the defendant denies the allegations contained in a designated numbered paragraph of the complaint.” And see *supra* p. 522, note 1.

¹¹ Cf. *Butler v. Wolf Sussman, Inc.*, *supra* p. 19, in which the court said that “there was an answer in general denial which was not good under the requirements of Rule 1-3,” for which see p. 20, note 2.

¹² Cf. Pomeroy, Code Remedies, § 502 (5th ed. 1929): “Nothing is gained by filling the record with specific denials, when one sweeping denial of the entire pleading will answer the same purpose and admit the same proofs.”

about them. We have seen, too, that men can acquire knowledge of particular things and events either directly by the exercise of their senses in perception or indirectly by the exercise of their reason in inference, and that an item of direct knowledge about a matter of fact is an immediate proposition and an item of indirect knowledge, an inferred or derived proposition. We have also seen that only a derived proposition can be material to a cause of action, or, we can now add, to a defense.

If, then, we let *P* represent any material proposition and *not-P* its contradictory, *P* or *not-P* may be knowledge about a thing or event which a pleader has obtained by making a single or a series of inferences either from what he himself has observed of it or from what some other person has told him about it. Legislatures and courts refer to perceptual knowledge of a matter of fact and to knowledge inferred therefrom as "personal knowledge" or "absolute knowledge"; to knowledge about a matter of fact reported to one person by another person as "information"; and to the knowledge inferred from information as "knowledge" or, more often, as "belief." Thus, in *Bennett v. The Leeds Manufacturing Company*, 110 N. Y. 150, 151, 17 N. E. 669 (1888), the court said: "Information is the source of much, indeed, of the most that we call knowledge. We affirm or deny the existence of an alleged fact, either from personal knowledge of its existence, or because we have information thereof which we credit." It is for this reason and because of the rules with respect to the verification of pleadings, which we shall subsequently consider, that material propositions may be alleged and denied, generally and specifically, either without qualification or "on information and belief." If *P* or *not-P*, as the case may be, is knowledge which a pleader has inferred, directly or indirectly, from his perceptual knowledge of the thing or event to which *P* relates, he may and must allege or deny *P* without qualification. But if *P* or *not-P* is knowledge which a pleader has inferred from "information" which he considers credible, *P* may and should be alleged or denied "on information and belief."¹³ But a pleader may have no perceptual knowledge and no information, or at least none which he regards as trustworthy, regarding the matter of fact to which *P* refers; in that event he need not deny *P* in order to create an issue; he may do so by denying that he has knowledge or information thereof sufficient to form a belief.¹⁴ It follows that *P* may not be alleged or denied

¹³ See *Bennett v. The Leeds Manufacturing Co.*, cited in the text; Clark, *Code Pleading*, 220-221, 594 (2d ed. 1947).

¹⁴ See the provisions of the New York and Illinois statutes and of the Federal Rules set forth above; Clark, *op. cit.*, at 593-595; *Bennett v. The Leeds Manufacturing Co.*, *supra*; *Kirschbaum v. Eschmann*, 205 N.Y. 128, 98 N.E. 328 (1912).

on information and belief if the matter of fact to which it refers is such—the pleader's own behavior, for example—that it can be presumed that he observed it.¹⁵ It follows, too, that a pleader may not deny knowledge or information sufficient to form a belief regarding the matter of fact to which *P* refers if it is such that it can be presumed that he has either perceptual knowledge or credible information—such, for example, as that contained in a public record—about it.¹⁶

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1245-1246.

. . . There are other types of opposition [than contradiction], which are called inconsistency or incompatibility, which are imperfect. Thus, the propositions, *X* is *Y* (John Doe was in New York last Thursday) and *X* is *Z* (John Doe was in London last Thursday), are inconsistent in the sense that if one of them be affirmed, the other must be denied, but it is not the case that one of them must be affirmed and the other must be denied. Inconsistent propositions are such that in some cases both can be denied; for example, both of the above propositions can be denied. In other cases both can be affirmed; thus, for example, both of the above propositions can be affirmed. In other cases both can be affirmed; thus, for example, the propositions "John Doe was not in New York last Thursday" and "John Doe was not in London last Thursday" can both be affirmed. In either case, the inconsistency usually depends upon a third proposition. Thus, in the case of the inconsistent propositions which can both be denied but not affirmed, the third proposition is "A man cannot be in New York and in London on the same day." If this proposition is not affirmed by the individual who affirms that John Doe was in London last Thursday, there is no inconsistency, and he fails therefore to deny the proposition that John Doe was in New York last Thursday. This is made clear by substituting Chicago for London in which case it is certainly doubtful whether the proposition "John Doe was in Chicago last Thursday" is inconsistent with the proposition "John Doe was in New York last Thursday." In the other case of inconsistent propositions in which both can be affirmed but not denied, the third proposition upon which their inconsistency depends is "John Doe was either in New York or in London last Thursday." If this proposition is not affirmed, no inconsistency results and the individual who denies that

¹⁵ Cf. Clark, *op. cit. supra*, at 221: "Where the circumstances are such that the plaintiff must be considered as having actual knowledge, such form of allegation is improper."

¹⁶ Cf. Clark, *op. cit. supra*, at 595-597; Kirschbaum v. Eschmann, *supra*.

"John Doe was not in London last Thursday" does not succeed in affirming that "John Doe was not in New York last Thursday."

This is summarized by the statement that inconsistency usually depends upon an inferential process in which a third proposition is necessarily involved. Unless the individuals seeking to oppose each other both affirm this third proposition, there is no inconsistency and opposition cannot be achieved. Opposition by the affirmation of contradictory propositions is therefore superior to opposition by the affirmation of inconsistent propositions, since in the former case contradiction must result and opposition cannot fail, whereas in the latter it must first be determined whether or not there is a genuine inconsistency before opposition can occur. In many cases the third proposition upon which the inconsistency must depend is not explicitly stated, and in some cases if this proposition were stated it might be challenged. The disadvantages of forming an opposition by inconsistency are thus revealed. They have been recognized by those conventions of the law of pleading which do not permit what is called an argumentative denial, that is, opposition by the allegation of inconsistent propositions. Although in many cases the parties' concurrence in the affirmation of the third proposition upon which the inconsistency depends makes it effective as a basis of opposition, it is nevertheless preferable to avoid the difficulties inherent in inconsistency by requiring that issues of fact be formed by contradiction.

NOTES

(1) *Sovereign Bank of Canada v. Stanley*, 176 F. 743 (C. S. D. N. Y. 1910): "The demurrer is well taken, for all the defenses are argumentative denials. The plaintiff, to succeed, must prove an individual transaction between itself and the defendant's testator. If it proves to be a firm transaction, it will be a fatal variance, without amendment. The only thing necessary for the defendant to show will be that the transactions upon which it relies were not with the defendant's testator, but with a firm of which he was a member. That shown, his [its?] complaint will have been answered. To plead that the agreement was with the firm is to plead evidence which will meet the allegation that it was with him."¹

(2) *Perkins v. Brock*, 80 Cal. 320, 322, 22 P. 194 (1889): Plaintiff alleged (1) that a firm transferred certain property

¹ Cf. *Pullen v. Seaboard Trading Co.*, 165 App. Div. 117, 119, 150 N.Y.S. 719 (1st Dep't 1914): "It is a well settled rule in this jurisdiction that material allegations of a complaint are not put in issue by inconsistent allegations in the answer, even though the intention to deny them is plainly inferable or to be implied from the inconsistent allegations."

and (2) that one of the partners transferred it without the consent of the other. "The two allegations [were] inconsistent. If the person making the transfer had no authority to bind the firm, it follows that the firm did not make the transfer." In their answer defendants alleged that the firm transferred the property but they did not deny the allegation showing want of authority. Plaintiff therefore contended that this allegation was admitted. The court *rejected* this contention. (i) If a defendant does not wish to demur specially for uncertainty to a complaint containing inconsistent allegations, he may deny the one which he wishes to controvert, leaving the other unnoticed. "In such cases, the denial of one statement would be construed as an affirmation of the other. If, therefore, the defendants had denied the allegation showing a want of authority, there would have been no difficulty." (ii) But "it is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint has been held to be equivalent to a denial. . . . If, therefore, the averment had been of the direct contrary of the allegation, showing the want of power, the averment would have raised an issue. It was not of the direct contrary, but was inconsistent with the truth of said allegation. This mode of pleading is not to be commended, because it savors of argument. But, under the circumstances, we think that it may be held to raise an issue. The alternative is to say that the answer admits that the transfer was invalid,—or in other words, that it admits that the firm did not transfer the property,—when it expressly averred that the firm did transfer it."

(3) *State ex rel. Cheeks v. Wirt*, 203 Ind. 121, 177 N. E. 441 (1931): "The appellant, as next friend of the relatrix, began suit . . . for the purpose of mandating appellees either to reinstate relatrix in a certain named high school or to transfer and admit her 'as a high-school pupil in one of the accredited high schools of the school city of Gary, Indiana.'" The complaint alleged, *inter alia*, that the relatrix was being denied "equal high school educational facilities and advantages afforded the other high-school students of said school city." In addition to a general denial, defendants answered: "Now comes the defendants and for further and second paragraph of answer say: That they have provided for relatrix herein and for all other school children, a school with all the rights, privileges and advantages of other schools in said city of Gary." *Held*, the trial court did not err in overruling relatrix' demurrer to the second paragraph of the answer, although it constituted an argumentative denial and although it is irregular to incorporate such a denial in an answer containing a general denial and it should be expunged. The remedy, however, is not by demurrer but by motion to strike out the allegation as redundant.² The remedy is not by demurrer since a denial, whether direct or argumentative, is not sub-

² Cf. *Bolton v. Missouri Pacific Railway Co.*, 172 Mo. 92, 102, 72 S.W. 530 (1903): "Any fact the effect of which is to show that an essential statement in the plaintiff's cause of action is untrue may be proven under the general denial, and, therefore, should not be specially pleaded and if so pleaded should be stricken out as redundant."

ject to a demurrer under the code.³ But it is not reversible error either to sustain or overrule a demurrer to such a defense. "No harm is done the defendant by sustaining the demurrer, since he can make his full defense under the general denial; and . . . no harm is done to the plaintiff by overruling his demurrer, since no evidence can be introduced under the argumentative denial which cannot be introduced under the general denial."⁴

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1246-1247.

Similarly for the sake of precisely forming an issue of fact, the rules of pleading prohibit negative pregnant. Only single propositions have contradictories; conjunctions of propositions do not. Let P stand for the proposition X is Y, and Q for the proposition M is N; then not-P and not-Q stand for their contradictories X is not Y and M is not N, respectively. But the conjunction of propositions "P and Q" has no contradictory.¹ In other words, the affirmation and denial of a conjunction of propositions is not the same as the affirmation and denial of a single proposition. Thus, while the affirmation of the conjunction "P and Q" is the same as the separate affirmations of P and of Q, the denial of the conjunction "P and Q" is ambiguous: it may involve only the denial of P, or only the denial of Q, or it may mean the denial of both P and Q. A conjunction of two propositions, in other words, is denied if either or both of its constituents are denied, whereas a conjunction of propositions is affirmed only if both of its constituents are affirmed.² Hence, if A affirms and B denies a conjunction, the result is not a precise issue of fact by reason of the ambiguity latent in the denial

³ Cf. *Staten Island Midland Railroad Co. v. Hinchcliffe*, 170 N.Y. 473, 481, 63 N.E. 545 (1902): "The remaining question . . . is whether the demurrer to the thirteenth separate defense should be sustained . . . The demurrer assumes the truth of the facts thus alleged. If they are true it is difficult to see why they do not constitute a valid defense to the cause of action set out in the complaint. It is probably a defense that could be proved under the general denial. There are defenses which may be stricken out on motion but cannot be reached by demurrer." Cf. also *Morgan Munitions Co. v. The Studebaker Corporation of America*, 226 N.Y. 94, 123 N.E. 146 (1919): "Matter which would be sufficient under a general denial loses none of its efficacy by being pleaded as a defense."

⁴ Cf. *Sais v. City Electric Co.*, 26 N.M. 66, 188 P. 1110 (1920). See *Pomeroi*, *Code Remedies*, §§ 520-523 (5th ed. 1929); *Clark*, *Code Pleading*, 592 (2d ed. 1947): "Under the codes, argumentativeness should be regarded as a defect only so far as it actually makes uncertain what allegations the answer is denying. The courts, however, can hardly be said to have so limited the doctrine."

¹ That this is the case will be understood as soon as it is seen that there are three alternatives to the conjunction "P and Q," namely, "P and not-Q," "not-P and Q," and "not-P and not-Q"; while the affirmation of "P and Q" leads to the denial of all of these three alternative conjunctions, the denial of "P and Q" does not lead to the affirmation of any one of the three; therefore, there is no contradictory of a conjunction of propositions.

² The same rule holds for conjunctions of more than two propositions.

of a conjunction. It is impossible to determine whether both of the propositions are being denied and if not, which of the two is. If it is crucial to the case either that one or the other of the propositions be denied or that both be denied, the error must be corrected. This situation sometimes arises in the process of pleading because of the way in which propositions are symbolized and expressed by ordinary language. What is commonly regarded as a single English sentence is frequently complex in that it symbolizes two or more propositions. Compound sentences usually indicate that they symbolize conjunctions of propositions since they contain the word "and"; but complex sentences, such as "He signed the document on June 23," appear to be simple, but are not. Such a sentence conceals a conjunction of propositions which can be stated as follows: "He signed the document—and—the signing of the document took place on June 23." If what a sentence of this sort symbolizes is denied, a conjunction of propositions is being denied; and an issue is not properly formed between the party affirming and the party denying what is symbolized by the given sentence. It should be noted that the distinction between sentences, which consist of words having certain grammatical relationships, and propositions, which consist of terms having certain logical relationships, must be made. A sentence is not affirmed or denied, but what the sentence symbolizes, one or more propositions as the case may be.³

NOTES

(1) *Bach, Cory and Company v. Montana Lumber and Produce Company*, 15 Mont. 345 (1895): Appeal by defendants from a judgment for plaintiff rendered upon the pleadings in an action of replevin on the ground that the answer contained no denial. *Reversed*. (i) "It is true that there was no denial in the answer that defendants took and received the lumber which was the subject of the action. The denial of the defendants is, that they did not take *and* carry away the lumber, etc. The denial is in the conjunctive . . . and is not a denial that they took the goods, or a denial that they carried them away." (ii) But the complaint also alleged "that on a certain day the plaintiff was the owner and lawfully possessed of the lumber. This essential allegation . . . was denied in the answer in the following language: 'The defendants deny that the plaintiff was, at the time mentioned, or at any other time, the owner or lawfully possessed of the lumber. . . .' Here the denial was in the disjunctive, which is pro-

³ Sentences and propositions are only analytically separable. A declarative sentence is not significant unless it symbolizes a proposition; a proposition cannot be held before the mind unless it is somehow symbolized. Despite this inseparability, the distinction between sentence and proposition is clear for anyone who knows that the same proposition can be symbolized by two or more sentences in the same language or in different languages, and that, because of the ambiguity of words, the same simple sentence often symbolizes two or more different propositions.

per." Hence, the answer raised a material issue and it was therefore erroneous to render judgment on the pleadings.⁴

(2) As we have seen, a negative pregnant, logically, is the denial of a conjunction of propositions and, hence, an ambiguous denial.⁵ Legally, a negative pregnant has been defined as a denial which implies an affirmative or which is pregnant with an admission.⁶ That is to say that in order to discourage the use of this form of denial, the pleader is deemed to have admitted one or more of the propositions which are conjoined in the allegation which is denied, but the decisions are not uniform in this respect. The propositions conjoined may all be material, or some of them may be material and others immaterial, to the plaintiff's cause of action. Apparently, in some, perhaps most, jurisdictions the defendant is deemed to have admitted all members of the conjunction which are material propositions⁷ and to have denied only the immaterial ones, such as allegations of time and place. So, in *Ison v. Ison*, 272 Ky. 836, 837-838, 115 S. W. 2d 330 (1938), the court said: "Ordinarily a negative pregnant does not make a material issue. Thus, where a number of facts are alleged connectively, and the answer denies them in the same conjunctive form, the denial admits the separate existence of each fact⁸ or goes only to certain facts⁹ and admits others." But even in those jurisdictions there is apparently an exception to the rule, which is stated in the *Ison* case in this way: "[W]here a fact is alleged with some qualifying or modifying language and the denial is conjunctive, it is held that only the qualification or modification is denied, while the fact itself is admitted." The exception was applied in *Cramer v. Aiken*.¹⁰ In that action for malicious prosecution and false arrest, plaintiff alleged that defendant had caused the imprisonment of plain-

⁴ Cf. *Hopkins v. Everett*, 6 How. Pr. 159 (N. Y. Sup. Ct. 1850), in which the complaint alleged that defendant "assaulted the plaintiff, and seized him by his collar and shook him violently," and the answer denied that defendant "did assault the said plaintiff, and seize him by his collar, and shake him violently." *Held*, "The denial . . . should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue." "The defendant has grouped three of the charges and denied them under oath in such a manner that if he should be guilty of any two and not guilty of any one, his answer would not be literally untrue. . . . The object of the special pleading and the oath adopted by the code, is to require the defendant to admit so much of the charge as he cannot conscientiously deny, and thus narrow the issues to those points which are really in controversy."

For a collection of cases see the note entitled "Negatives Pregnant" in Ann. Cas. 1917 A. 668.

For discussions of the form of denial known as a negative pregnant, see Pomeroy, *Code Remedies*, §§ 509-514 (5th ed. 1929); Anderson, *Negative Pregnant*, 3 Idaho L. J. 245 (1933).

⁵ Cf. *Cramer v. Aiken*, 68 F.2d 761, 762, 63 App. D. C. 16 (1934): "This is considered as a fault in pleading for the reason that it is ambiguous and evasive."

⁶ See, e.g., *Cramer v. Aiken*, *supra*.

⁷ As in *Bach, Cory, and Company v. Montana Lumber and Produce Company*, *supra*, and *Ison v. Ison*, cited in the text.

⁸ That is, it does so if each "fact" is material.

⁹ That is, the immaterial ones, as in *State Bank of Stearns v. Stephens*, 265 Ky. 615, 97 S.W.2d 553 (1936); *Busenius v. Coffee*, 14 Cal. 91 (1859); *Cincinnati, &c., R. Co. v. Barker*, 94 Ky. 71, 21 S.W. 347 (1893); *Baker v. Bailey*, 16 Barb. 54 (N. Y. Sup. Ct. 1852); *Janeway & Carpender v. Long Beach Paper & Paint Co.*, 190 Cal. 150, 211 P. 6 (1922).

¹⁰ *Supra* n. 5.

tiff unlawfully, that is, that defendant had caused plaintiff to be imprisoned and that the causing of plaintiff to be imprisoned was unlawful. Obviously, both members of the conjunction were material to plaintiff's cause of action. Defendant denied that "he unlawfully . . . restrained the plaintiff of his liberty." The court said that a reasonable interpretation of the denial was "that the defendant did not deny the allegation . . . that he had caused the imprisonment of the plaintiff, but that he denied that it was done unlawfully." In other jurisdictions, a "negative pregnant" is taken to deny those members of the conjunction which are material and to admit only those which are immaterial.¹¹ In still others, there is apparently no rule with respect to the matter; in these jurisdictions the question in each case is whether the denial is psychologically as well as logically ambiguous, that is, in traditional language, whether it is indefinite and uncertain; and if it is, it is subject to a motion to make definite and certain, made before answering.¹² And in Clark's opinion this is as it should be.¹³ Of course, only a specific denial can be a negative pregnant.¹⁴

MILLER v. GENERAL MOTORS CORPORATION

Supreme Court of Michigan, 1937. 279 Mich. 240, 271 N.W. 746.

Case by John Miller, doing business as John Miller Electric Company, for the use and benefit of Standard Accident Insurance Company, a Michigan corporation, against General Motors Cor-

¹¹ See, e.g., *Donovan v. Main*, 74 App. Div. 44, 77 N.Y.S. 229 (2d Dep't 1902), in which plaintiff alleged that Tarrant & Co. was engaged in manufacturing chemicals which were of an explosive character. Defendant denied that Tarrant & Co. was engaged in manufacturing chemicals of an explosive character. "The learned justice at Special Term held that denials *in haec verba* or in gross are not permissible. . . . [While this may be true in some cases, it was error as applied to the present pleadings. When a paragraph of a complaint contains allegations material to the cause of action, the answer may contain a general or specific denial of each material allegation of the complaint . . . ; that is, may deny each and every allegation of a paragraph or may use either the substantive words or the exact words of the allegation in making the denial. . . . A denial of all the substantive allegations of a paragraph set out in the language used in the complaint is tantamount to a denial of each allegation of the paragraph." In *Kellogg v. Freeland*, 195 N.Y.S. 912 (Sup. Ct. 1922), the court said (at p. 913): "The defect known as a negative pregnant, usually arises where the answer denies immaterial allegations of the complaint, which relate to time and place merely."

¹² See, e.g., *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 222, 86 P. 399 (1906), in which the court said: "When a party to an action is advised by his adversary, in such a manner that he understands what is meant by the allegations of the pleading, whether a complaint or answer, the requirements of the law are met, and the case should be tried upon its merits." See, also, *Merchants' National Bank v. Richards*, 74 Mo. 77 (1881); *S. C.*, 6 Mo. App. 454 (1879). Cf. *Cramer v. Aiken*, *supra* n. 5, at p. 762: "The rule against a negative pregnant . . . appears in modern times, at least, to have received no very strict construction. For many cases have occurred in which on various grounds of distinction from the general rule such a form of expression has been held to be free of objection. Moreover, an objection to a negative pregnant is not regarded favorably by courts where it is not made before trial. . . ."

¹³ Code Pleading, 588-591 (2d ed. 1947).

¹⁴ See *Stone v. Quaal*, 36 Minn. 46, 47-48, 29 N.W. 326 (1886); *Electrical Accessories Co. v. Mittenhal*, 194 N.Y. 473, 87 N.E. 684 (1909); *McGrath v. Valentine*, 167 F. 473 (C.C.A. 9th 1909).

poration, a Delaware corporation, for damages on a subrogated compensation claim. Motion by plaintiff to dismiss defendant's answer or, in the alternative, to require amended answer. Motion granted. Defendant appeals. Affirmed.

BUSHNELL, J. Plaintiff, for the use of his insurer, brought an action of trespass on the case on a subrogation claim against defendant. In the declaration, plaintiff alleges that he paid compensation to one of his employees; that the employee was working on top of a stepladder at defendant's plant in performance of a contract between plaintiff and defendant; that the ladder was placed with its base on the floor in such a position so as to be fully and readily visible to all persons near the ladder; that two of defendant's employees, their names being unknown to plaintiff, were engaged in pulling or propelling a hand truck loaded with upholstering material and, notwithstanding the fact that the ladder was plainly visible, they negligently pushed the truck against the ladder, causing it to topple over and fall with the result that plaintiff's employee received serious injuries for which he recovered compensation from plaintiff, who in turn seeks to collect from defendant.

Defendant categorically answered each and every paragraph in the declaration. The answer admitted one paragraph, denied others, and as to the remainder, the defendant averred that it had not sufficient knowledge or information so as to form a belief and therefore neither admitted nor denied them, but left plaintiff to his proofs. In this latter respect, the answer followed the provisions of Court Rule No. 23, § 2 (1933).¹ Plaintiff contends that the denials of certain paragraphs were insufficient as they contained no statements as to the matters upon which defendant would rely to support such denials as provided for in Court Rule No. 23, § 2 (1933), and for that reason plaintiff moved to have defendant's answer stricken. The court so ordered, however, giving defendant time to file an amended answer. Defendant claims its answer was sufficient and that the court erred in striking it from the files.

Under Court Rule No. 23, § 1 (1933), the plea of general issue was abolished and answers were provided for. The latter part of Court Rule No. 23, § 2 (1933), provides that in connection with every denial the answer shall set forth the substance of the matters which will be relied upon to support such denial. The purpose of the rule is to narrow the issue solely to facts in dispute and to make it unnecessary to prove those matters upon which there should be no dispute.² The main purpose of a lawsuit is to

¹ For this rule, see *supra* p. 520.

² Cf. *Adair v. Bonninghausen*, 305 Mich. 137, 144, 9 N.W.2d 35 (1943): "The purpose of the court rule is to expose fictitious defenses."

elicit the truth and when the facts are known to either side and do not admit of any dispute, they should be frankly stated so as to make it unnecessary for the opposite party to offer proof as to such facts and thus also save the time of the court. This is especially true in cases involving breach of contracts³ where all the elements entering into the contract should be fully and freely brought out by declaration and answer so that the issue may be limited to the sole point or points over which there is a dispute. A stricter observance of the rule is exacted in *assumpsit* than in tort where frequently most of the facts are very much in dispute. The rule does not make the declaration a bill for discovery nor does it require the defendant to produce its evidence prior to trial. It, however, does require in tort cases the setting forth of the substance of the matters which will be relied upon to support a denial. There can be no specific formula set forth as to what the answer should contain in a denial in a tort case and the sufficiency of the answer largely must rest within the sound discretion of the circuit judge.

In the instant case, in paragraph two, plaintiff alleges that he was engaged as an independent contractor under contract with the defendant in performing certain electrical construction and repair work in and about the defendant's plant where it is alleged the accident happened as specifically set forth. Defendant answers the paragraph by neither admitting nor denying it, but leaving plaintiff to his proofs. Defendant had a right under the rules to make its answer in this form, but it seems quite improbable that defendant would not know whether it had a contract with plaintiff. The answer to this paragraph rather indicates a desire to withhold all information and not to comply with the spirit of the rules. Paragraphs six and seven of plaintiff's declaration state that his employee, while engaged in performing work under the contract and while on a ladder, was thrown down and thus was injured, by reason of the negligence of two of defendant's employees who carelessly struck the ladder with a hand truck and that the persons so propelling the hand truck were employees of defendant engaged in its business and acting within the scope of their employment. Defendant's answer to these two paragraphs is a denial. It does not aver lack of knowledge of the facts, but denies *in toto* the allegations of the paragraphs. In so doing, it does not even admit that an accident occurred. Again, while it is possible that no such accident did occur, the very denial, instead of an averment of lack of knowledge, indicates that defendant did have some knowledge. Plaintiff was entitled to know in general the facts, though not the evidence,

³ Why should it be?

upon which defendant relies. The accident may have taken place under circumstances which involved no liability whatsoever on defendant's part. If it knows that the accident did take place, or any other circumstances, it should so state. If it does not know, it should state its lack of knowledge.

There was no abuse of discretion on the part of the court in ordering a fuller answer and the order is affirmed, with costs to plaintiff.

FEAD, C. J., and NORTH, BUTZEL, and SHARPE, JJ., concurred with BUSHNELL, J.

WIEST, J. (*dissenting*). Defendant's answer was sufficient. It was not necessary for defendant to supplement the denial of alleged facts by a statement of matters upon which it would rely to support such denials. A flat denial carries no implication of retention of matters which should be disclosed in the pleading.

I cannot subscribe to the postulate that the very denial indicates that defendant did have some knowledge of the alleged happening which should be imparted to plaintiff in the pleading.

Order should be reversed with direction to set aside the order sustaining objections to defendant's answer. Costs to defendant.⁴

NOTE

Levy v. Massachusetts Accident Co., 124 N. J. Eq. 420, 441, 2 A. 2d 341 (1938): "Paragraph 2 of the main answer denies the allegation of the bill that 'a true copy of the policy is annexed to the bill.' This is improper pleading. Undoubtedly defendant does not mean that the copy is not for the most part correct. If there is any particular in which there is an error or omission in the copy, such particulars should be set forth. So also, paragraph 12 of the main answer simply denies the allegation of the bill that 'complainant is now and always has been ready, willing and capable of performing all of the obligations required to be performed by him under said policy.' There should be no blanket denial; the answer should specify any particular or particulars in which complainant has not been ready and willing to perform. See Chancery Rules 54, 57, 58, 67, 45 and 46.⁵

"The purpose and function of pleadings is to set forth and *define* the issues between the parties,—narrowing them so that

⁴ Cf. Sunderland, *The New Michigan Court Rules*, 29 Mich. L. Rev. 586, 589-590 (1931): "[E]ven specific denials will require an accompanying statement of the facts upon which they rest in all cases where the evidence to sustain them consists of affirmative matter. For example, if a defendant denies an allegation that he made a certain promise, and his position is that he did not make it because the promise actually made was a different promise from the one alleged, or that the agent who purported to promise in his behalf was without authority to do so, he must set up these facts in his answer in support of his denial." See also Ailes, *Substance and Procedure in the Conflict of Laws*, 39 Mich. L. Rev. 392, 409 (1941); Blume, *The Scope of a Civil Action*, 42 Mich. L. Rev. 257, 289 (1943). Cf. Federal Rule 8(b), *supra* p. 519.

⁵ For rules 57, 58 and 67, see *supra* p. 521.

it will appear just exactly what is in dispute. Blanket denials do not accomplish this; and they occasion the courts,—and indeed the parties also,—more trouble and waste of time than any other violation of the rules of pleading.

"These two paragraphs of the main answer will be stricken on the court's own motion. Defendant may have leave to substitute proper particular denials, by amendment, if such be deemed material and important."

NOTE ON TRUTHFULNESS IN PLEADING

The process of pleading is preliminary to the process of proof; its function is to determine whether the controversy comprehends any issues of fact and, if it does, to define those issues. Issues of fact are tried by the proof and disproof of the contradictory material propositions of which they are constituted, and the end of their trial ought to be the just resolution of the controversy. If the rule of substantive law which regulates the controversy is a just one, then the just resolution of the controversy depends upon the tribunal's giving the correct or better answers to the issues of fact rather than the incorrect or worse ones.¹ Obviously, it will be easier for the tribunal to give the correct or better answers if the issues are clearly and precisely defined before the processes of proof and disproof are undertaken. Moreover, other things being equal, the greater the volume of relevant evidence, pro and con, which is presented to the tribunal, the more likely it is to achieve the correct or better answers. But the evidence is likely to be incomplete unless each party knows what material propositions his opponent is going to try to prove, and knows this sufficiently in advance of the trial to enable him to prepare to disprove them, if he can. Consequently, as we have seen, the rules of pleading have among their purposes the formation of clear and precise issues and the giving of "fair notice." We have heretofore considered a number of rules and devices which are designed, however ineptly, to accomplish those objectives, such, for example, as the rules which require pleadings to state material "facts," rather than "conclusions" or evidence, and the motions to make definite and certain and for a bill of particulars. One of the reasons commonly given for the prohibition of the general denial is that these ends are better served by the specific denial.

It is obvious, too, that it is in the interest of economy—of time, of effort and of money—that the issues formed by the pleadings should be actual or genuine rather than pretended or feign-

¹ Cf. Michael & Adler, *The Trial of an Issue of Fact: I*, 34 Col. L. Rev. 1224, 1230 (1934). This indicates the relationship between truth and justice.

ed. But they will not be, unless pleaders are truthful. A pleader is truthful if what he states to be his knowledge about a matter of fact, namely, a material proposition which he alleges, is actually his knowledge; he is untruthful if he does not in fact possess the knowledge which he claims to have. Of course, we must be careful to distinguish between truthfulness and untruthfulness, as qualities of litigants or other men, and truth and falsity, as qualities of the propositions which they assert. A proposition is true if what it states to be the case is actually the case; it is false if what it states to be the case is actually not the case. Every proposition about a matter of fact is actually true or false; and its truth or falsity can be determined only by reference to what is the case. But the truthfulness or untruthfulness of one who asserts or alleges a proposition can be determined only by reference to the state of his knowledge at the time he asserts it.

It can now be seen that the genuineness of an issue of fact depends upon the truthfulness of the disputants. If a plaintiff alleges and the defendant denies *P*, the resulting issue, which is of the form "*P* or *not-P*," will be genuine if both are truthful, but only formal if either or both are untruthful.

Truthfulness in pleading is also one of the objects of the rules of pleading.² Another reason given for the prohibition of the general denial is that the specific denial is better adapted to this end also.

Another means employed to attain that end is the requirement that a pleading be verified by the affidavit of the pleader "to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true."³ As Clark points out, in some jurisdictions no pleading is required to be verified save in certain exceptional instances; in others, every pleading is required to be verified, save in certain exceptional instances; in still others, as in New York, it is optional with the pleader whether or not he will verify his pleading unless a prior pleading has been verified, in which event all subse-

² See Clark, Code Pleading, 253 (2d ed. 1947). There were certain rules of common law pleading which Stephen could not classify (see *supra* p. 363); these he called "miscellaneous rules," and the 9th of them was "All pleadings ought to be true." But he went on to say [Stephen, Pleading, 488 (Williston's ed. 1895)]: "While this rule is recognised, it is at the same time to be observed, that in general there is no means of enforcing it, because regularly there is no proper way of proving the falsehood of an allegation, till issue has been taken, and trial had upon it. Persons engaged in vexatious defences have taken advantage of this difficulty, by resorting to the practice of what is called *sham pleading*, that is, pleading, for the mere purpose of delay, a matter which the pleader knows to be false."

³ This is quoted from N. Y. R. Civ. Prac. 99.

quent pleadings must be, again saving certain exceptional instances.⁴

It is a crime to make a false verification⁵ and the fear of punishment for perjury is relied upon to induce litigants to plead truthfully.⁶ But opinions differ and fluctuate with respect to the efficacy of verification as a means to truthfulness in pleading. Section 133 of the New York Code of Procedure (1848) required every pleading to be subscribed and verified by the party, his agent or attorney, "to the effect that he believes it to be true," except when the party would be privileged from testifying as a witness to the same matter. Of this section the New York Commissioners on Practice and Pleadings said [First Report, 152-153 (1848)]: "By the verification of pleadings in the qualified manner here proposed, several important advantages are gained. The system of pleading heretofore in use, has encouraged, if it has not absolutely required, fictitious statements, until men otherwise scrupulous, have lost sight of all limits of veracity in the character of their allegations in pleading. It is designed to bring back to legal allegations, made in solemn form in writing, at least the same regard to truth, that prevails between members of society, in their daily communications to one another." But, as Clark says,⁷ "this was changed after a year in 1849 to give the plaintiff the option of verifying the complaint, and to any party the power, by verifying his pleading, to compel the verification of subsequent pleadings." In 1934 The Commission on the Administration of Justice in New York State recommended⁸ that it be required that the affidavit of verification state that the person verifying the pleading "has made diligent inquiry into all the facts with respect to the transaction involved in the suit," but it hastened to add that "it is doubtful whether any change in the mere form of the verification [as opposed, it may be supposed, to changes in the hearts of men] can accomplish very much by way of discouraging unmeritorious complaints or fictitious an-

⁴ See Clark, *op. cit. supra*, at 215-220, where the jurisdictions are classified and the "exceptional instances" referred to in the text are enumerated. Nebraska is one of the states which require every pleading to be verified save in certain exceptional instances. Neb. Rev. Stat. § 25-824 (1943). As the court points out in *Marshall v. Rowe*, *infra* p. 552, this statute provides that denials as well as allegations "made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading." It is very difficult to reconcile the statute with the view of the court in *Marshall v. Rowe* as to the function of a denial.

⁵ See, e. g., N. Y. Penal Law §§ 1620-1620-b; *Lapley v. State*, 170 Wis. 356, 174 N.W. 913 (1919); 7 A.L.R. 1283.

⁶ But see *A Study of Perjury: V. Statistics on Enforcement of Perjury Laws*, in N. Y. Law Revis. Comm'n, Report 231, 285 (1935).

⁷ *Op. cit. supra*, at 216-217.

⁸ Report, 272.

swers." And in 1941 the New York Judicial Council recommended⁹ a return to the requirement of the Code of 1848 that all pleadings, with certain limited exceptions, be verified. Of their recommendation the Council said: "Actions, particularly for personal injuries, might never be started, if verification of the complaint were required, because false allegations would render the affiant liable to perjury prosecution. During the last few years, the effectiveness of means for prosecuting perjury has been greatly increased as a result of statutory changes, one of which provides for the prosecution of certain types of perjury as a misdemeanor.¹⁰ The possible effect of the recommended change, therefore, in eliminating a great deal of questionable litigation is far-reaching."

Professor Millar, on the other hand, has expressed the opinion, which Clark shares,¹¹ that sworn pleadings are of doubtful efficacy in ensuring good faith in allegations. He thinks that they tend to reduce the oath to a mere matter of convention and to favor the unscrupulous at the expense of the conscientious litigant.¹² In any case, the Federal Rules dispense with verification for the most part and instead require that the pleader's attorney certify, by signing the pleading, that he has read it, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. And for a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.¹³ Clark regards certification by a party's attorney, which he characterizes as the "modern practice," as "definitely desirable."¹⁴ As long ago as 1831, Her Majesty's Commissioners on the Superior Courts

⁹ Seventh Annual Report, 42-43.

¹⁰ See N. Y. Pen. Law § 1620-b. For the number of prosecutions for and convictions of perjury in the second degree since the creation of that crime, see the table entitled "District Attorneys—Disposition of Perjury Actions," which is included among the statistical tables included in the annual reports of the New York Judicial Council.

¹¹ *Op. cit. supra*, at 216, n. 17: "[T]he code experience has not justified the use of the oath."

¹² Millar, *The Old Regime and the New in Civil Procedure*, 14 N.Y.U.L.Q. Rev. 197, 199 (1937).

¹³ See Federal Rule 11, *supra* p. 519. Cf. *Matter of Schreiber*, 170 App. Div. 543, 156 N.Y.S. 545 (1st Dep't 1915), in which a lawyer who "had been but a few months admitted to the bar" and who did "not seem to have realized the obligation of an attorney at law to the courts and the public," was "severely censured" for preparing an answer containing a general denial and causing his client to verify it when he knew or had reason to believe that the material allegations of the complaint were in fact true; *Matter of Mathot*, 178 App. Div. 759, 166 N.Y.S. 217 (1st Dep't 1917), appeal dismissed 228 N.Y. 8, 117 N.E. 948, and *Matter of Tinney*, 187 App. Div. 569, 176 N.Y.S. 102 (1st Dep't 1919), in which more experienced lawyers, both admitted to the bar in 1879, were disbarred for similar misconduct. In the case last cited the court said (187 App. Div. 574, 176 N.Y.S. 102): "The interposition of a false answer in an attempt to postpone the payment of a just and admitted claim is a serious offense. . . ."

¹⁴ *Op. cit. supra*, at 216, n. 17.

of Common Law characterized the signature of counsel, as a device for preventing sham demurrers, as an "unmeaning form," and recommended that in lieu of the "mere signature" of counsel, counsel be required to certify that he is of the opinion that "there is probable ground in law for this demurrer, and that it is fit to be argued." But they had this to say of their proposal: "We cannot, indeed, feel certain that in the course of time the certificate may not come to be signed with as little caution as now attends the signature of the demurrer itself; but confidence in the good feeling and honour of the profession, induces us to hope otherwise. . . ." ¹⁵ The Commissioners also regarded the signature of counsel, as a device for preventing sham pleas, as an unmeaning form,¹⁶ and recommended that instead it should be discretionary with the Judge to require a plea in bar, containing new matter, to be supported by affidavit, "if the Judge upon inspection of the pleadings, shall see reason, from the nature of such plea, to suspect that it is untrue, and pleaded only for the purpose of delay. . . ." ¹⁷

The present Rules of the Supreme Court of England (O. 21 r. 9) provide that "where the court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted," and some of the American codes contain similar provisions.¹⁸ Professor Millar regards this rule, "although hard to operate, since its application involves in each case a particular inquiry into the matter of extra expense arising from the denial," as being "on the whole, . . . much to be preferred" to the requirement of verification.¹⁹

FEDERAL RULES OF CIVIL PROCEDURE

Rule 16. Pre-Trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;

¹⁵ Third Report, 30 (1831).

¹⁶ *Op. cit. supra*, at p. 44.

¹⁷ *Op. cit. supra*, at 49, 83.

¹⁸ See, e.g., Neb. Rev. Stat. § 25-284 (1943), *infra* p. 556, n. 3; Ill. Prac. Act § 41, *supra* 519; Conn. Gen. Stat. § 5514 (1930).

¹⁹ *Op. cit. supra* n. 12, at 199.

- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

KLITZKE v. HERM

Supreme Court of Wisconsin, 1943. 242 Wis. 456, 8 N.W.2d 400.

Action commenced on December 20, 1941, by William Klitzke, as administrator of the estate of Otto Knoener, deceased, against Melvin Herm and Emma Herm, his wife, to recover the value of certain personal property alleged to have been converted by defendants to their own use. In a pretrial conference had between the court and counsel under sec. 269.65, Stats., the court entered an order determining the items of personal property as to which the title might be litigated in the action, although the pleadings put in issue additional items, title to which was in dispute. From an order entered June 26, 1942, plaintiff administrator appeals. Defendants have filed a motion for review. The material facts will be stated in the opinion.

PER CURIAM. On December 16, 1940, Otto Knoener, deceased, by warranty deed conveyed to the defendants certain described real estate. Immediately following the description of real estate is the clause, "Including all livestock and machinery." At the time of making the aforesaid conveyance, grantor had upon his farm a considerable amount of personal property aside from his livestock and machinery. This action involves the ownership of the personal property alleged to have been converted by defendants. As indicated in the foregoing statement, in the

pretrial conference the court entered an order specifying the particular items, title to which might be litigated, even though the pleadings put in issue many additional items, ownership of which was in dispute and concerning which the parties were unable to agree. The court on the basis of the matters disclosed at the conference, without agreement of counsel, ordered that certain items should not be considered at the trial.

Respondents have not raised the question whether the order entered by the court is an appealable order under the provisions of sec. 274.33, Stats. This court will on its own motion determine whether it has jurisdiction. If the order from which the appeal is taken is not an appealable order, then we are without jurisdiction. . . .¹

Even though the appeal herein must be dismissed, it brings before us for the first time an order entered by a trial court in the course of pretrial proceedings. Pretrial procedure is a comparatively new development in the judicial process. It has been employed for some ten or fifteen years in the Wayne county, Michigan circuit courts and in more recent years has been adopted in a number of jurisdictions.

Pretrial procedure was introduced into the law of this state by supreme court order effective January 1, 1940, being sec. 269.65, Stats., which is as follows:² . . .

This section is identical with Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, adopted by the supreme court of the United States, effective September 17, 1937. . . .

It is evident that there is some misconception as to the meaning and purpose of sec. 269.65, Stats. For that reason we shall attempt to clarify the section and indicate the methods for its use. It is not proposed to lay down any hard and fast rule of law but to make available to the bench and bar of the state some of the developments of the procedure in those jurisdictions where it has been longest in use.

There is general agreement that in order to accomplish the purpose of pretrial procedure and make it serve a useful purpose in the process of adjudication, there must be a spirit of co-operation between the court and the lawyers representing litigants. In order to bring this about there must be a mutual understanding of what may properly be accomplished by a pretrial conference.

¹ In the omitted part of the opinion the court held that the order was not an appealable order.

² As the court proceeds to point out, the Wisconsin statute is identical with Federal Rule 16, for which see *supra* p. 540.

In some quarters there seems to be a notion that it is a procedure adopted to enable the pretrial judge to force a settlement of the case. It would be most unfortunate if that idea was to prevail generally. Litigants as well as counsel often resent what they regard as an unjustified interference by the court with their legal rights. For that reason the judge before whom the pretrial conference is held must proceed with tact and understanding, and above all, with patience.

In order to make accessible to the bench and bar the experience of a federal judge, we set out the following condensation of an article entitled "Pretrial Procedure Under the New Federal Rules,"³ by Justice Bolitha J. Laws, United States district court for the District of Columbia. Without attempting to quote him exactly, Justice Laws in substance says:

Pretrial procedure has not the slightest chance of succeeding unless it is properly administered by the judge. Not only by the pretrial judge, but the trial judge and counsel in the jurisdiction. If the judge approaches the hearing of a pretrial case in a formal and indefinite manner, discusses the issues in a cursory way, and suggests the possibility of settlement, the proceeding will prove a futile waste of time. Pretrial proceedings are held within not more than three weeks prior to trial. It is not unfair to counsel on either side to require them to honestly and fully state the issues upon which they will rely and eliminate those which as of the time immediately preceding the trial they know they will not use. Therefore, the first thing which a judge should do at pretrial is to require counsel for both sides to make a full and complete opening statement, precisely as he would at the final trial, as to what he expects to prove. When these statements are made, the pretrial judge will ask a number of questions and will comment upon some of the points. After these discussions, which may last from fifteen minutes to a half hour or longer, the judge will dictate the controlling issues to a stenographer in open court. This statement will be approved by counsel and for that reason counsel should exercise care to see that the issues are correctly stated by the court. It is of the greatest importance that the judge at pretrial should not be too persistent about a settlement. He may suggest figures, he may give his views but it is not the part of wisdom to undertake to force counsel to make settlement against his will. The presiding judge should make it clear to counsel that he realizes that they are entitled to their day in court and are not to feel the slightest hesitan-

³ 12 Missouri Bar Journal (April, 1941), p. 95.

cy in disagreeing with the views expressed by the judge. Such a course will prevent resentment and a feeling that the judge has unduly and improperly influenced the making of a settlement.

It is common practice to stipulate with respect to many items of evidence. These stipulations generally relate to such matters as ownership of premises, condition of weather, hospital records, medical expenses, photographs, and plates, whether the party is a corporation or partnership, whether the party was agent or servant of another, and many other points as to which there is no real controversy. In actions, for personal injury a notation at a pretrial conference should be made as to whether the plaintiff claims permanent injuries, and if he does, what is the nature of the permanent injury claimed.

The pretrial judge should be liberal in regard to litigating facts concerning which there is reason for dispute and should sanction a presentation of facts through witnesses where it seems necessary to give a proper picture of the case. Where, however, a point is perfectly clear and there is no sound reason for litigating it and no need to have witnesses appear, the court is justified in expecting a stipulation at pretrial.

The pretrial procedure in the district court for the District of Columbia is as follows:

"When a case is within about ten days of being reached on the pretrial calendar, the assignment commissioner of the court will send a printed post card advising counsel for the respective parties the day and hour when the pretrial hearing will be held. The hearings at pretrial are staggered, that is to say, so many are set for one hour and so many for a different hour during the day. This is done in order to avoid the necessity of counsel being kept waiting to be heard.

"The hearings are usually held in open court, and after discussion of the facts of the case, law points, points which may be stipulated and the possibility of compromise, the court dictates to a typist in the courtroom what is known as a pretrial report. This summarizes a statement of the contentions of both litigants; it also contains the stipulations of the parties and any remarks or recommendations which the pretrial judge feels he should make for consideration of the trial judge. After completion of the report the pretrial order is initialed by each counsel, is signed by the pretrial judge and is placed in the file. Counsel for each side is furnished with a copy of the pretrial report. The case then is certified to the ready-for-trial calendar.

"After the case is certified from the pretrial calendar to the ready-for-trial calendar, the court will not grant continuances except for extraordinary causes. The rule of court in our jurisdiction provides that the pretrial judge shall have control of both the pretrial calendar and the ready-for-trial calendar and that he must approve all continuances. This practice has resulted in the disposition of many cases which heretofore long have been dormant upon the calendar of the court."

It is to be noted that sec. 269.65 (2), Stats., requires that—

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, *and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel.* . . ."

A pretrial conference is not a part of the trial, that is, the court is not to take up and decide issues presented by the pleadings as to which counsel have not agreed. In the pretrial conference an effort is made to have the parties agree as to the disposition of some of the issues. Those issues not disposed of by agreement must be disposed of upon the trial and it is these issues which the pretrial judge is to embody in his order. It is quite possible that pretrial procedure is better adapted to metropolitan districts where there are a number of trial judges so that the pretrial judge will not be obliged to try the case. There is no doubt, however, it may be used with great advantage where the conference and the trial must be presided over by the same judge. It should not be forgotten that litigants are entitled to an impartial trial of their cases and are not to be penalized if they stand upon their rights.

After counsel have agreed as to the matters to be disposed of upon the trial and have made such stipulations as to introduction of evidence, etc., as are agreed upon, the result of the pretrial proceeding is to be embodied in an order. Copy of such an order is printed in the margin.⁴

4

PRE-TRIAL PROCEEDINGS

Statement of Nature of Case:

Suit for personal injuries claimed to have been sustained by plaintiff due to flowing lightning or static electricity through the telephone receiver at the U. S. Naval Observatory. Plaintiff claims that due to negligent installation and maintenance of the telephone system, and also due to the failure to properly insulate, the injuries resulted to plaintiff. Defendant maintains that it was guilty of no negligence, that in the installation, insulation and maintenance of the telephone system, it exercised reasonable care and caution.

Permanent injuries claimed to hearing of right ear and sight of right eye.

The order of course must be varied in substance and form so as to adapt it to the particular case under consideration.

While a pretrial judge carries a heavy responsibility, it must not be overlooked that attorneys representing litigants are almost equally responsible for the results of a pretrial conference. If attorneys by their belligerency, stubbornness, or contumaciousness obstruct the course of the judicial process, they must in the end expect to bear the consequences of their misconduct. A pretrial conference presupposes that the attorney is a competent lawyer, has prepared his case both upon the facts and the law, and is ready to give the matters involved adequate and proper consideration. If because of lack of preparation and understanding of issues an attorney is hesitant, doubtful as to his rights, uninformed as to the law, a pretrial conference is not likely to bring a desirable result. Therefore, it should not be treated with indifference and as if it were unimportant. Court procedure is undergoing a slow but marked change. Attorneys who by their industry and learning secure for their clients an expeditious and desirable end to litigation are much more likely to be successful than those who expect to win through courtroom oratory. If properly employed pretrial procedure may be a great step in ad-

Acts of negligence will be relied upon by plaintiff, the case not to be submitted on the doctrine of *res ipsa loquitur*. Plaintiff also will not submit the case on theory of duty to exercise highest degree of care, as set forth in first count of declaration.

Stipulations: By agreement of counsel for the respective parties, present in court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the court to prevent manifest injustice:

Plaintiff will supply to defendant's counsel within ten days, itemized statement of expenditures to date, and will permit a physical examination by an ear specialist and an eye specialist within ten days, provided satisfactory specialists are selected in each instance, and further provided defendant will supply plaintiff with a copy of the report of each of the specialists within two days after rendered.

Expert testimony at the trial is ordered to be limited as follows: Two expert physicians on each side as to alleged injuries to ear; two on each side as to alleged injuries to eye; two on each side as to electrical features of the case, it being understood that the limitation as to the electrical features will not apply to witness named Wilhelm, for defendant, and witness named Conway, for plaintiff (each of the two named witnesses will be called to testify as to facts of case and may be permitted to testify as experts if desired, in addition to the two experts each which may be called by either side).

Parties have entered into a written stipulation as to exhibits, which is attached hereto and made a part of this pretrial hearing.

(Note: Five-page stipulation attached to original pretrial order contains stipulations as to photographs, documents, specifications and plans, telephonic equipment to be offered as exhibits and specimens of switchboard equipment, and permits introduction of photostatic copies and transcripts in lieu of original documents and record.)

POLITHA J. LAWS,
Pretrial Justice.

Handbook, National Conference of Judicial Councils (1942), p. 95.

MICHAEL—LEGAL CONTROVERSY UCB

vance in the disposition of litigation, and to that end the bench and the bar should heartily co-operate.⁵

Appeal dismissed.

NOTE

La Plante v. Implement Dealers Mutual Fire Insurance Co., 73 N. D. 159, 12 N. W. 2d 630 (1944): Defendants appealed from an order of the pre-trial court (1) requiring them "to either admit that the amount of gross premiums stated in the complaint is correct, or if not correct, file a sworn statement giving the correct amount," and (2) denying defendants' motion that plaintiff be required to amend his complaint in a certain respect. The North Dakota statute providing for pre-trial hearings is similar to Federal Rule 16, and the statute defining appealable orders is similar to the Wisconsin statute "with the exception that [the latter] does not include orders that involve the merits of the action or some part thereof." Defendants contended that the order affected their substantial rights and involved the merits of the action and "that a pre-trial is sufficiently in the nature of a special proceeding to come within the statutory provisions permitting appeals in such matters." Appeal *dismissed*. (i) "Section 7329, Comp. Laws N. D. 1913, divides remedies in courts of justice into two classes: 1. Actions, 2. Special proceedings. A pre-trial conference is not a special proceeding. It can scarcely be termed a remedy. It is incidental to a remedy; an episode in an ordinary proceeding. It takes place within an action as the result of a statutory digression from established practice, provided by the legislature for the purpose of clearing away legalistic debris prior to the trial. An effective pre-trial conference should result in narrowing issues, settling pleadings, limiting the number of witnesses, and in general, shorten the actual period of trial. It is hoped that in many cases settlements will be promoted and no trial at all will be necessary." (ii) "The order was made under the provisions of sections 1 and 2 of the act in question. The non-appealability of this order becomes obvious upon the study of section 2 which says that 'such order shall control the subsequent course of the action unless the ends of justice require its modification.' We interpret this language to mean that the order made by the pre-trial judge is not final in the sense of binding the trial judge to abide by or enforce it notwithstanding the ends of justice may require its modification. . . . A pre-trial order does not destroy the power of the trial judge to control the trial in the interest of justice and when such interest requires it, he may define the issues and discharge or modify stipulations. Neither does the pre-trial statute deprive the trial court of the exercise of judicial discretion in permitting amendments or corrections of mistakes in pleadings under general statutory provisions." (iii) "The decision of an appellate court

⁵ Bibliography: Pretrial Procedure, 6th to 11th Annual Reports of the Judicial Council of Michigan, p. 63; Pretrial Hearings and Assignment of Cases, 33 Illinois Law Review, 699; The Theory and Practice of Pretrial Procedure by Edson R. Sunderland, 36 Michigan Law Review, 215; Pretrial Procedure, Some Practical Considerations, 26 Am. Bar Assn. Journal, 592; The Pretrial Conference Under the Federal Rules of Civil Procedure (1940), 18 Texas Law Review, 190.

becomes the law of the case as to all matters properly within the scope of the appeal and as to these matters it controls all subsequent trials or proceedings. Should pre-trial orders made following the conference and preceding the trial be appealable an anomalous situation would be created in view of the power vested in the trial court to modify the order. If the general rule were applied and the appeal resulted in an order that was final and controlling as to the subsequent trial, it would impart to the order attributes of finality contrary to the statute and not contemplated by the legislature. If the rule would not apply, the appellate decision would be subject to modification at the will of the trial court and appeals would merely result in a further delay in the administration of justice, contrary to the purpose of the pre-trial statute."

SECTION 2. THE SUBSTANTIVE ADEQUACY OF NEGATIVE DEFENSES

PROBLEMS

1. Suppose that the propositions which are material to a case of action are P_1 , P_2 and P_3 and that a complaint alleges each of those propositions: What is the rule of substantive law which is implicit in the answer (a) if the defendant denies each of those propositions or (b) if he denies only the first of them?

2. By what criterion or criteria can it be determined whether or not an answer which interposes only negative defenses states facts sufficient to constitute a defense or is sufficient in law?

MINNESOTA STATUTES 1945

544.08 Demurrer or Reply to Answer. The plaintiff, within 20 days after the answer is served, may demur thereto, or to any counter-claim or defense pleaded therein, upon the ground that the same does not state facts sufficient to constitute a defense or a counter-claim, as the case may be; and he may demur to one or more of such defenses or counter-claims, and reply to the remainder. If the answer contains new matter not demurred to, the plaintiff shall reply thereto, denying the averments controverted by him, or averring that he has not knowledge or information thereof sufficient to form a belief, or alleging any new matter, not inconsistent with the complaint, constituting a defense thereto.

WASHINGTON REVISED STATUTES ANNOTATED¹

§ 276. Demur to Answer—Reply. The plaintiff may demur to an answer containing new matter, when it appears upon the

¹ 2 Rem. Rev. Stats. Wash. Ann. (1932).

face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue.

CALIFORNIA CODE OF CIVIL PROCEDURE
ANNOTATED 1946

§ 443. (When Plaintiff May Demur to Answer.) The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein.

§ 444. (Grounds of Demurrer.) The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim;
3. That the answer is ambiguous;
4. That the answer is unintelligible; or
5. That the answer is uncertain.

NEW YORK RULES OF CIVIL PRACTICE

Rule 109. Plaintiff's Motion on the Answer.

After the service of an answer, the plaintiff may serve notice of motion to dismiss a counterclaim or strike out a defense consisting of new matter contained therein, where one or more of the following defects appear on the face thereof:

1. That the court has not jurisdiction of the subject of the counterclaim.
2. That the defendant has not legal capacity to recover on the counterclaim.
3. That there is another action pending between the same parties for the same cause.
4. That the counterclaim is not one which may be properly interposed in the action.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.
6. That the defense consisting of new matter is insufficient in law. If upon a motion made pursuant to this subdivision, it shall appear that the complaint does not state facts sufficient

to constitute a cause of action, the court hearing the motion may dismiss the complaint, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just, even in the absence of a cross-motion therefor.

A notice of motion specifying an objection set forth in subdivisions 2, 3 or 4 hereof shall be served within twenty days after the service of the answer. A notice of motion specifying an objection set forth in subdivisions 1, 5 or 6 hereof may be served at any time prior to trial. . . .

HILL v. WALSH

Supreme Court of South Dakota, 1894. 6 S.D. 421, 61 N.W. 440.

KELLAM, J. Appellant, as plaintiff, brought this action in claim and delivery against respondent, as sheriff, to recover a stock of goods, or its value, of which appellant claimed to be the owner, and as such entitled to the immediate possession. The answer admitted the taking, and justified under attachments issued to him, as such sheriff, against one Nancy J. Fulton, from whom it was alleged the property taken was fraudulently acquired by the plaintiff. The allegations of the answer will be more particularly noticed as we proceed. The plaintiff demurred to the answer on the grounds (1) that it does not state facts sufficient to constitute a defense; and (2) that it does not state facts sufficient to show that this plaintiff is estopped from maintaining said action. The court overruled the demurrer, and plaintiff appeals.

As the foundation of his right to recover this property, the plaintiff, in his complaint, alleged that "he is the owner, . . . and as such owner is entitled to the immediate possession," etc.; thus resting his cause of action upon his ownership and resultant right to possession. His right to possession was expressly made to depend upon his ownership. He thus distinctively negatived any right to possession, except "as such owner." The answer specifically alleges "that the property described in the complaint, and so levied upon by the defendant as aforesaid, was at the time of said attachment and levy the property of the said Nancy J. Fulton, and not the property of the plaintiff, and that at the time of said levy as aforesaid the said property, and every part thereof, was in the possession and under the actual custody of the said Nancy J. Fulton." And again: "The defendant further denies that the plaintiff is, or ever was, the owner of the property described in the complaint, or any part thereof." The answer also denies each and every allegation of the complaint "not specifically admitted or controverted." This was an absolute

and unqualified denial of every material and fundamental fact upon which plaintiff rested his right of action. With no other defensive allegation than these, the answer would seem to state a good defense, and so be beyond the reach of a demurrer.¹ For the purpose of this demurrer, these denials must be treated as true; but if true that plaintiff was not, and Nancy J. Fulton was, the owner of this property, and that plaintiff was not, but that she was, in the actual and exclusive possession of the same, it is difficult to see how plaintiff's claim or cause of action can be maintained. An answer which sets up a complete bar to the cause of action pleaded in the complaint cannot be generally demurrable. The demurrer was probably intended to test the sufficiency of the affirmative defense as pleaded in the answer, but it was directed against the answer generally, and as a whole. The rule in such case is that the demurrer must be overruled, if the answer contained one good defense. Maxw. Code Pl. 566; Bliss, Code Pl. sec. 417; Cobbey, Repl. sec. 750 *et seq.*, and cases cited. See, also, Cumins v. Lawrence Co., 1 S. D. 158, 46 N. W. 182. . . .

For the reasons indicated the order appealed from is affirmed, and the cause remanded to the circuit court for further proceedings according to law.²

NOTE

It may have been observed that the Minnesota and California statutes provide for a demurrer to the answer or to any defense therein, whereas the Washington statute and the New York rule provide for a demurrer to or a motion to strike out "new matter," that is, an affirmative defense contained therein. In jurisdictions with statutes of the latter type it is said in substance that a plaintiff may not demur to an answer which interposes only negative defenses. For example, in *Galbraith v. Daily*, 37 Misc. 156, 158, 74 N. Y. S. 837 (Sup. Ct. 1902), the court said: "[N]o demurrer is allowed to a 'denial' however defective, but only to a 'defence' or counterclaim, as is prescribed by section 494 of the Code of Civil Procedure."³ This section illustrates the difference between a 'denial' and a 'defence' in the nomenclature of pleading. A 'denial' is not a 'defence'; they are separate pleas."⁴

¹ Cf. *Schell v. The City of Walla Walla*, 44 Wash. 43, 86 P. 1114 (1906): "The demurrer to the answer was properly overruled, for it was practically a denial of all the averments of the complaint, and if it did not state a defense, it was because the complaint did not state a cause of action." See *Mansfield v. Avery*, 18 Neb. 478, 25 N.W. 626 (1885); *Ruth v. Ruth*, 12 Neb. 594, 12 N.W. 108 (1882).

² Cf. *Dean v. Atkinson*, 201 Iowa 818, 822, 208 N.W. 301 (1926): "[A] general denial is never the subject of a demurrer."

³ This section, the precursor of Rule 109, provided: "The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law upon the face thereof."

⁴ Cf. *Lund v. The Seamen's Bank for Savings*, 39 Barb. 129, 131-132 (N. Y. Sup. Ct. 1862); *Selts Investment Co. v. Bairreuther*, 202 Wis. 151, 153, 231 N.W.

MARSHALL v. ROWE

Supreme Court of Nebraska, 1934. 126 Neb. 817, 254 N.W. 480.

EBERLY, J. [In April, 1917, Marshall recovered a judgment for \$2,000 against Drs. Rowe and McGrath in a malpractice action, but execution thereon was returned unsatisfied. So, in May, 1917, Marshall brought a suit in equity against McGrath in which he sought a decree adjudicating that certain land, which had been conveyed to Mrs. McGrath, was her husband's and subject to the lien of Marshall's judgment against him and Rowe. In his petition Marshall alleged that McGrath purchased the land with his own funds while the malpractice action was pending but that, in order to prevent or hinder the collection of any judgment that might be rendered against him in that action, he had the land conveyed to his wife. McGrath filed a *verified* answer, in which he denied "each and every allegation in said petition contained." Marshall subsequently took the depositions of certain witnesses and thus obtained evidence which "tended in a substantial degree" to prove what he had alleged. But in 1920, while this suit in equity was still pending, Drs. Rowe and McGrath paid and Marshall accepted \$1500 in full satisfaction of his judgment. Marshall then executed a "satisfaction of judgment," and, with his consent, the suit in equity was dismissed "with prejudice."

[Mrs. McGrath died in 1925. In 1926 McGrath brought an action against her children, who were her heirs, in which he sought and obtained a decree adjudging that he was the owner of the very land, the ownership of which he had denied in Marshall's suit in equity. Upon the trial of his action he testified, under oath, that he had bought the land with his own funds but that he had caused it to be conveyed to his wife as "a protection that doctors frequently use on account of the frequency of damage suits."

[In 1926, following the trial of McGrath's action, Marshall instituted a second suit in equity against McGrath. In his petition he repeated the allegations of his petition in his first suit in equity, and alleged in addition that in that suit McGrath had filed a verified answer denying each and every allegation contained in Marshall's petition; that he had also under oath denied the ownership of the land in supplementary proceedings; that these denials were false but that Marshall was unable to prove their falsity until McGrath had testified in his own action against

641 (1930); *Merritt v. Knife Falls Boom Corporation*, 34 Minn. 254, 25 N.W. 403 (1885).

his wife's children; and that for this reason Marshall was compelled to accept \$1,500 in settlement of his judgment for \$2,000. He therefore prayed that the satisfaction of that judgment which he had executed be set aside, that his first equity suit be reinstated, that his judgment be revived and held to be a lien on McGrath's land, and that the land be sold and the proceeds of the sale applied to the payment of the unpaid balance of \$500 which was still due him on his judgment. McGrath's demurrer to this petition was sustained.]

Thereafter on September 24, 1928, the plaintiff filed in the original case of Marshall v. Edward W. Rowe and Benjamin R. McGrath in the district court for Lancaster county, Nebraska, a verified application to set aside the satisfaction of judgment filed therein on December 1, 1920. To this application the defendants separately demurred, and these demurrers were sustained by the district court, and the proceeding dismissed. On appeal to this court the action of the trial court was reversed. See *Marshall v. Rowe*, 119 Neb. 591, 230 N. W. 446, to which reference is made for a resumé of the allegations of the pleading then involved.

The proceedings now presented to this tribunal, based on and including the motion to set aside the satisfaction of judgment and the petition in equity filed in the district court subsequent to the remand from the supreme court, were consolidated in the district court. Separate answers of the defendants were filed to these consolidated pleadings and issues were finally made up by the filing of plaintiff's reply. . . . A trial on the merits resulted in a decree for the plaintiff . . . , and defendants appeal.

Without passing on the validity of certain technical defenses presented by the defendants, two issues may be taken as controlling on this review, viz., fraud, and the statute of limitations. Appellee's position on this subject fairly appears in the following excerpt from pages 4 and 5 of his brief: "Our theory of the case is that the judgment of the supreme court was something more than a scrap of paper. It meant a positive order to McGrath to pay that judgment; that, when the supreme court made that order and an execution was issued, McGrath owed an affirmative and positive duty to disclose immediately that he owned the property in question; that, when a creditor's bill was filed, the appellant, Benjamin R. McGrath, had no right to file a general denial and compel Marshall to dig out the facts. Instead, it was McGrath's duty to come into court and disclose the facts."

Furthermore, appellee asserts that this general denial thus filed by McGrath in 1919 was a positive and actual fraud, and

was an additional or a new fraud distinct from that against which relief in the original creditor's bill was sought and by means of which the settlement was made, which resulted in the execution of the satisfaction of judgment which the decree appealed from canceled and set aside. . . .

We are unable to accept the conclusion thus urged by appellee, either as to the affirmative legal duty of McGrath to disclose, or the effect of the general denial filed by him. We are convinced that this contention on part of plaintiff is not sustained by the precedents cited in support thereof in his brief, and involves an erroneous interpretation of the controlling principles involved in the transaction.

Plaintiff's claims are fundamentally predicated upon the doctrine announced in *Graver v. Faurot*, 76 F. 257, and *Guild v. Phillips*, 44 F. 461. The scope and effect of these decisions are to be determined in the light of the procedure they exemplify.¹

. . . Both involved on part of the respective plaintiffs the exercise of the right of discovery, under common-law procedure which has been hereinbefore substantially outlined, the limits of which were necessarily prescribed in the interrogative parts of the original bill filed in each case. The reports of these decisions before us emphasize the fact that in each case the defendant answered under oath and the substance of the answers thus made is given. Such answers, as we have seen, then stood, not alone as pleadings, but as testimony of a controlling nature. The conclusion thus finds abundant support. On the basis of this testimony, *Graver v. Faurot*, *supra*, was actually decided; and in *Guild v. Phillips*, *supra*, a consent decree was rendered because of the presence thereof. It will be remembered in this connection that, under the former practice, "the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts." *Bronk v. Charles H. Scott Co.*, 211 F. 338, 340. So, in both cases now under consideration, the equivalent of perjured evidence entered into the disposition of the questions involved, and the judicial determinations made were based thereon; and likewise it is on the basis of perjured evidence (not sham pleading) that *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, and the other Nebraska cases cited by plaintiff on the present question were decided. However, in the instant case no perjured evidence on part of the defendant appears in the record. Hence, perjured evidence could not have entered into or influenced the basic agreement of

¹ The Court's discussion of this procedure, the discovery procedure in equity, is omitted.

compromise of the parties. Therefore these federal cases and the Nebraska decisions following the same are not here in point.

Even if it be assumed that the case before us is within the scope of section 901 of the Civil Code (Comp. St. 1929, sec. 20-2225²) and, as such, that "the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice," it affords the plaintiff no assistance. Tested by the controlling principles of that procedure which prevailed prior to the adoption of the Code, the petition of May 8, 1917, is absolutely barren of allegations essential to an interrogative part of a proper bill in equity, both in body and in the prayer, and entitled the plaintiff to no disclosures whatever. The answer thereto, a general denial, likewise tested by the same criterion, so far as its evidential character was concerned, was wholly insufficient because of nondisclosive nature, and the failure to attach a positive verification. If accorded any function, this general denial would amount to no more than a defensive pleading, and not a discovery of evidence. 1 Whitehouse, Equity Practice, 448. This would not bring the present case within the doctrine of *Graver v. Faurot, supra*, or *Guild v. Phillips, supra*, or within the reasoning of the Nebraska cases that cite and rely on the *Graver* and *Guild* cases as precedents.

Nor are plaintiff's contentions referred to aided when tested in the light of the provisions of our Civil Code. The second paragraph of this enactment provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.'" Comp. St. 1929, sec. 20-101.

Section 90 of our Civil Code is as follows: "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Comp. St. 1929, sec. 20-802.

Section 91 limits the initial pleading on behalf of plaintiff to a petition (Comp. St. 1929, sec. 20-803) and it is further provided by section 92 that the petition "must contain . . . a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-804.

² Now Neb. Rev. Stat. 1943 § 25-2224: "Cases not provided for in this code; procedure. If a case ever arises in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice."

Section 99 of this Civil Code provides, as to answers: "The answer shall contain: First. A general or specific denial of each material allegation of the petition controverted by the defendant. Second. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-811.

These provisions not only in express terms abolish bills in equity with discovery as an incident thereto as formerly approved, but by specifications as to the nature of the statements properly to be incorporated in petitions effectively prevent the incorporation of the essential elements upon which the right of discovery as it formerly existed was based. In addition, section 20-824, Comp. St. 1929,³ provides expressly that an answer verified under the Code shall not be used "against a party in any criminal prosecution or action . . . as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party, provided that allegations or denials made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading." So, also, a verification of a pleading is sufficient if it states that affiant believes the facts stated in the petition to be true. Comp. St. 1929, sec. 20-827; *Harden v. Atchison & N. R. R.*, 4 Neb. 521.

It appears that our Civil Code by these provisions has, as to causes of action pleaded and carried on in strict conformity therewith, effectually abolished bills of equity with discovery as incidental thereto, and that answers save and except so far as statements therein may involve admissions against interest, have by the terms thereof been wholly deprived of the characteristics of evidence, which they were accorded by the equity practice superseded. "In some of the states a suit for discovery, properly so called, is expressly abolished by statute, and in all of them is utterly inconsistent with both the fundamental theory and with the particular doctrines and methods of the reformed procedure." *Wright v. Superior Court*, 139 Cal. 469, 472, 73 P. 145. . . .⁴

According to the weight of authority, an answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it. 1 Bancroft, Code Pleading, sec. 229. "Originally, to 'defend,' in the law of pleading, imported simply a denial of that

³ Now Neb. Rev. Stat. 1943 § 25-824.

⁴ Other citations omitted.

which constituted the basis of the plaintiff's claim, as alleged in his pleading." *First State Bank of Hazen v. Radke*, 51 N. Dak. 246, 199 N. W. 930.⁵

Our Code accords to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right of recovery. Plaintiff's pleadings under the Code do not reach the defendant's conscience as was formerly the result of bills of equity under the chancery practice. Pomeroy, Code Remedies (5th ed.) sec. 561; 1 Bancroft, Code Pleading, sec. 233; *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897⁶; *Phoenix Ins. Co. v. Bachelder*, 39 Neb. 95, 57 N. W. 996;⁷ *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883.⁸ It appears that a general denial is proper where the defendant *bona fide* challenges a single element of those essential to plaintiff's recovery (*Upton v. Kennedy*, 36 Neb. 66, 53 N. W. 1042);⁹ and that this pleading under the theory of our Code will not be interpreted as a response to a search of the conscience of the defendant in the manner required under the former practice in equi-

⁵ The statement from the opinion in the Radke case, which the court quotes, appears on the 16th page (p. 264 of 51 N. Dak.) of an opinion of 18 pages. The only question concerned the incidence of the burden of proof upon the issue of want of consideration in an action on a promissory note (pp. 249-250). For the proposition quoted, the court in the Radke case cited 3 Blackstone, Commentaries, *296, where the author says: "Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint." The court's problem in the Radke case required it to distinguish between negative defenses, interposed by denials, and affirmative defenses, and it was in that context that it made the quoted statement and cited Blackstone. It is very difficult to see what all this has got to do with the question whether the function of the general denial is to put a plaintiff to his proof or to interpose genuine negative defenses.

⁶ There is not even a dictum in this case to the effect for which it is cited. The only question which it involved relating to a denial was whether the court erred in excluding certain evidence offered by defendant who had pleaded only a general denial. The court held that the exclusion of the evidence was correct because evidence to establish an affirmative defense is inadmissible under a general denial.

⁷ The nature of the problem involved in this case is indicated by the following (39 Neb. 97, 57 N.W. 996): "The distinct allegation of the answer . . . was such new matter as by provision of our Code called for a reply. The only reply . . . is a general denial, while the facts relied on are in the nature of an avoidance, which must be specially pleaded. The only issue presented by the reply was the truth of the allegations of the answer. It follows that facts tending to excuse the default were not admissible. . . ."

⁸ That this case has no bearing whatever upon the proposition for which it is cited, is indicated by the court's statement of the question which it had to decide (35 Neb. 175, 52 N.W. 883), namely, "was evidence showing that the note had been altered after its execution admissible under the general denial in the original answer."

⁹ This was an action on promissory notes by the endorsee against the maker who pleaded a general denial which plaintiff moved, upon affidavits, to strike as sham. On the hearing of the motion defendant stated that he did not intend to dispute the genuineness of the notes but insisted that he was "entitled to make any defense available under a general denial." The court held that the trial judge erred in granting the motion because the answer, which was verified, did not on its face appear to be false.

ty through the agency of bills in equity with discovery as an incident thereto. The fundamental reason which supports this construction of our Code provisions is to be found in its provisions, where (1) the incompetency of parties to the action to testify has largely been removed, and the deposition of the defendant covering all facts in issue in any particular litigation may be secured by the plaintiff prior to trial (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121, 61 N. W. 111; *In re Hammond*, 83 Neb. 636, 120 N. W. 203); (2) provisions enabling the plaintiff to secure the production of all papers in defendant's possession or control relating to, and necessary for, the proper determination of the issues made by the pleading (Comp. St. 1929, secs. 20-1267 to 20-1273); (3) provisions which permit the defendant in creditors' suits to be examined in aid of execution (Comp. St. 1929, secs. 20-1566, 20-1567). In view of these statutory enactments it becomes obvious that the reasons which necessitated the former equity practice have passed away. It follows that, considered in and of itself, the filing of a verified general denial by Dr. McGrath to the petition of the plaintiff in 1919 was the exercise of a right accorded him by statute to put plaintiff to his proof,¹⁰ and was not the commission of a fraudulent act, for he then owed no legal duty of disclosure to plaintiff as a matter of pleading.

It appears from the record that the settlement upon which the "satisfaction of judgment" in suit was based was the result of the efforts of the representatives of both Dr. McGrath and Dr. Rowe. Neither of the doctors personally took active part in the negotiations that led up to it. Each doctor contributed one-half of the \$1,500 paid. Dr. Rowe acted in the utmost good faith in this matter, personally borrowed the amount contributed by him, and the pleading makes no charge of fraud against him. Further, it affirmatively appears that Dr. Rowe, at the time of this settlement, had no knowledge of any fraudulent conduct on part of Dr. McGrath.

Plaintiff's claim is that, until Dr. McGrath's testimony as to the facts and ownership of this land given on August 20, 1926, became a matter of court record, he had, though suspicious, lacked necessary proof to establish these facts. In this connection the rule in this jurisdiction is that the knowledge of a client's attorney is attributable to and binds the client, where such attorney is acting regularly in good faith in that capacity for his client.

¹⁰ It is very difficult for the editor, at least, to reconcile this conception of the function of a general denial with Neb. Rev. Stat. § 25-824 (1943), *supra* note 3, which requires "every pleading of fact to be verified," and also requires a party who without probable cause makes allegations or denials which are found untrue to pay the reasonable expenses necessarily incurred by the other party "by reason of such untrue pleading."

Goergen v. Department of Public Works, 123 Neb. 648, 243 N. W. 886. See, also, *Security Trust Co. v. Tuller*, 243 Mich. 570, 220 N. W. 795; *Bates v. A. E. Johnson Co.*, 79 Minn. 354, 82 N. W. 649. As already indicated, the verified petition filed in plaintiff's behalf in the district court for Hall county on May 8, 1917, positively stated the facts of this real estate transaction substantially identical with those as testified to at that time by Dr. McGrath. In addition to this, the deposition filed in this cause as early as February 7, 1920, in connection with original documents made a part thereof, not only clearly revealed the fraudulent character of this land transaction, but in connection with surrounding circumstances might be deemed ample evidence to sustain plaintiff's pleading to the extent of establishing a *prima facie* case. In addition to putting the plaintiff on inquiry, obvious sources of additional information were indicated. The rule is that, "Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry." *Talich v. Marvel*, 115 Neb. 255, 212 N. W. 540 (quoting from *Cooper v. Newman*, 45 N. H. 339).

While it unmistakably appears from the entire record that this real estate transaction of Dr. McGrath was a fraud, and that his acts in connection therewith were fraudulent, yet the fact remains that he made no false statements, claims or representations concerning this land, or the ownership thereof, and committed no fraud in connection with the same, save the fraudulent concealment effected by the transfer of the record title thereof to his wife in 1914. On this state of facts the statute of limitations is tendered as a defense. Our Code provides that civil actions can only be commenced within four years for relief on the ground of fraud, "but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Comp. St. 1929, sec. 20-207. Within the intendment of the terms of the statute just quoted the record establishes that the plaintiff in fact discovered this fraud not later than January 29, 1920, that being the day when the deposition was taken of which the letters signed respectively by Dr. McGrath, by the doctor's wife, and by the banker, all relating to the southwest quarter of section 4, township 10 north, range 11, were produced and made a part, which deposition was subsequently filed in the district court for Hall county on February 7, 1920. It necessarily follows that the action is barred. *Hanna v. Bergquist*, 102 Neb. 658, 168 N. W. 365; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Coad v. Dorsey*, 96 Neb. 612, 148 N. W. 155; *Parker v. Kuhn*, 21 Neb. 413, 32 N. W. 74.

We have no occasion to examine into the validity of the original settlement or compromise between these parties, or the legal effect of the steps taken. These occurred long after knowledge of the fraudulent transfer involved became imputable to the plaintiff.

"It is obvious that there can be no fraud where the agreement is entered into with knowledge of the facts." 12 C. J. 349. This proceeding to set aside the "satisfaction of judgment" was commenced in the district court for Lancaster county on the 24th day of September, 1928, more than eight years after the cause of action, if it ever existed, accrued. The controlling maxim invoked by this record is: "The laws assist those who are vigilant, not those who sleep over their rights." Broom's Legal Maxims (9th ed.) 570.

It follows that the district court erred in the decree entered in behalf of the plaintiff, in setting aside said satisfaction of judgment dated November 26, 1920, and filed in the district court for Lancaster county in case designated as Docket 53, No. 45, and in reinstating the judgment satisfied thereby. This decree is therefore reversed, with directions to reinstate said satisfaction of judgment, and to set aside the order reinstating said judgment, and to dismiss said proceeding of plaintiff with prejudice to further action.

Reversed.

NOTE

Wayland v. Tysen, 45 N. Y. 281 (1871): "The entire answer of the defendant was struck out. It was a general denial of the complaint. It was verified by the defendant . . . in the manner required . . . when the complaint is verified. The motion to strike it out was made upon affidavits tending to show its falsity, and the court arriving at this conclusion, made the order striking it out as sham.¹ The Code (§ 152) provides that sham and irrelevant answers and defenses may be stricken out on motion . . ." Order reversed. (i) "This answer is the equivalent of and substitute for the general issue under the common law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common law system the general issue could not be struck out as sham, although shown by affidavits to be false."² (*Broome Co. Bank v. Lewis*, 18 Wend., 565.)

¹ In *The People v. McCumber*, 18 N.Y. 315, 320-321, 72 Am. Dec. 515 (1858), the court said: "A defence is sham, in the legal meaning of that term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation. The chief characteristic of a sham defence is its undoubted falsity. Such a mere formal defence is sometimes designated as a false defence. The words 'sham' and 'false,' applied to such a defence, signify the same thing."

² In *The People v. McCumber* the court said (at 322): "The wisdom of this exception is not very apparent; and I can perceive no good reason for it beyond the difficulty, in most cases, from the comprehensive scope of the general

This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The court, under that system, exercised the power of striking out pleas setting up affirmative defences as sham when shown by affidavits to be false, but not where the party verified such pleas by affidavit. (*Stewart v. Hotchkiss*, 2 Cow., 634.)" (ii) These rules have not been changed by section 152 of the Code. "The section in question simply confers power upon the court to strike out sham and irrelevant answers and defences. This power the court, as we have seen, possessed and exercised under the pre-existing laws. For reasons deemed satisfactory it was not extended to the general issue. When this was interposed as a defence the party had a right to a trial by jury. This right is secured to him by section 2, article 1 of the Constitution. This right could not be taken away by simply changing the name from that of general issue to that of general denial. We have seen that the latter is the substitute for and the equivalent of the former, so far as to require proof by the plaintiff of all the material facts showing his right of recovery. This is an argument tending to show that the Legislature, in the passage of the section in question, only intended to sanction the existing practice, and not to confer any new power upon the court.³ Under the construction claimed, there is nothing to prevent the trial of this or any other issue upon affidavits. The moving party has only to satisfy the court by a preponderance of evidence of this character of the falsity of the plea, and it may be struck out, although specifically verified by the party interposing it, notwithstanding such party may insist upon his right to a trial, when he can have the privilege of cross examining the affidavits, and having their credibility passed upon by a jury. I think that by the true construction of the section, the power of the court to strike out pleadings was not extended beyond what it was under the pre-existing law."⁴ (iii) "It may be said that

issue, in establishing satisfactorily its falsity. That plea, under the old system, was generally not only a denial in a short form of all that was material in the declaration, thereby putting the plaintiff to the proof of his cause of action, but it included many affirmative defences which were admissible in evidence under it. The reason sometimes stated for the exception was, that the defendant had a right to put the plaintiff to the proof of his cause of action, in all cases, whether the former had any defence or not (*Broome County Bank v. Lewis*, 18 Wend., 565; *Mier v. Cartledge*, 8 Barb., 75); but I know of no better right to obstruct the plaintiff in the enforcement of an honest demand to which there is no defence, by the general issue, than by a special plea. The former might be—as easily at least as the latter, and was oftener in practice—made the means of dishonestly postponing the collection of a just demand, and thereby working injury to a plaintiff."

³ In *The People v. McCumber* the court said (at 323): "One leading policy of the new system is, to suppress falsehood and secure truth in the pleadings A limitation of this section by the courts to affirmative answers and defences would, to a great extent, frustrate the policy referred to, and allow of great abuses in pleading, and improper and injurious delays of justice."

⁴ In *The People v. McCumber* the court said (at 324): "Another objection to the order in respect to the first defence is, that the defendant was entitled to have the material issues formed by the defence, tried by a jury, and that it could not lawfully be tried against his consent on *ex parte* affidavits. This objection, if available in this case, might equally be made to orders striking out affirm-

a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectually deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs, while the defendant is precluded by an adverse result. It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practising a fraud for this purpose by putting a falsehood upon the record. Concede the construction of the section claimed by the respondent, as we must to sustain the order, and its exercise cannot be confined to this class of cases." (iv) "If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse."

MINNESOTA STATUTES 1945

544.10. Sham and Frivolous Pleadings. Sham, Irrelevant, or frivolous answers, defenses, or replies, and frivolous demurrers, may on motion be stricken out, or judgment rendered notwithstanding the same, as for want of answer or reply.

NEW YORK RULES OF CIVIL PRACTICE

Rule 103. Striking Out Matter Contained in a Pleading. (*Supra* p. 414.)

Rule 104. Sham or Frivolous Answer or Reply.

If an answer or reply be sham or frivolous the court may treat the pleading as a nullity and give judgment accordingly or allow a new pleading to be served upon such terms as the court deems just.

ative defences forming material issues, and would be fatal to the section above mentioned of the Code, and the entire practice as to striking out false or sham answers. The true answer to the objection is, that the right of the defendant to a trial by jury depended upon there being a real issue to be tried; that the court had power to determine whether there was such an issue, or whether the apparent issue was fictitious and sham, not to try the issue if there was not one in truth as well as in form; and that the order decides, on most satisfactory proof supporting it, that the defence was destitute of truth and substance, and presented no real issue."

A verified or unverified answer or reply containing a general or specific denial or affirmative defense may be struck out if proved to be sham. Affidavits may be used to determine whether an answer or reply is sham.

NOTE

The Judicial Council of New York, Tenth Annual Report 309-310 (1944): "Amendment of both Rule 103 and 104 of the Rules of Civil Practice, with respect to sham pleadings, is recommended. Present Rule 103 differs from present Rule 104 in that the motion under Rule 103 authorizes striking out *any part of any pleading* proved to be sham, whereas the motion under Rule 104 authorizes striking out *an answer or reply* proved to be sham in its *entirety*."

"It is recommended that Rule 103 be amended by adding a provision expressly permitting a general or specific denial, or an affirmative defense contained in an answer or reply, whether or not verified, to be struck out if such denial or defense is proved to be sham. As a necessary adjunct of this change, it is recommended that Rule 103 be amended by providing that affidavits may be used in order to determine whether the matter sought to be struck out is sham."

"The Codes gave the courts power to strike out a sham answer or defense, which power, however, was invalidated by judicial construction. But there was no provision in the Codes to strike out merely part of an answer or defense or other pleading as sham as provided by Rule 103."

"Rule 104 is derived in part from the former Code sections dealing with a motion to strike out a sham answer or defense. Although the relief obtainable under Rule 104 may also be had in many cases under Rule 113, there is no other rule under which the party moving pursuant to Rule 103 may seek aid."

"Under the Codes, the courts had held that where the answer contained a general denial or a verified affirmative defense, it could never be struck out as sham. There is no holding by the Court of Appeals as to whether present Rule 103 or Rule 104 has changed the law on this point. In *Fleischer v. Terker*,¹ the Court of Appeals expressly declined to determine whether a general denial may be struck out as sham on affidavits, deciding only that such a general denial could not be disregarded on mere inspection. Among the four departments, there is a conflict on the point."

NEW JERSEY STATUTES ANNOTATED

2.27-124. Striking Defense; Defense on Terms; Appeal from Order

Subject to rules, any defense to the whole or to any part of the complaint which defense is insufficient in law or sham may

¹ 259 N.Y. 60, 181 N.E. 14 (1932).

be struck out, or, if it appears probable that the defense is insufficient in law or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section.

2:27-125. Striking Complaint or Counterclaim or Part Thereof

Subject to rules, a complaint or counterclaim insufficient in law or sham, or any count or part thereof, may be struck out, or, if it appears probable that the complaint or counterclaim is insufficient in law or sham, plaintiff or counterclaimant may be allowed to proceed therewith on terms.

NATIONAL SURETY CORPORATION v. CLEMENT

Court of Errors and Appeals of New Jersey, 1945. 133 N.J.L. 22, 42 A.2d 387.

The opinion of the court was delivered by

BROGAN, CHIEF JUSTICE. This is defendant's appeal from a summary judgment entered against him after his answer was struck out by the learned trial judge. The complaint avers: that the plaintiff, surety company, on April 25th, 1941, executed its bond to a partnership known as Kaplan Brothers, which obligated it to indemnify the partners against any loss arising out of larceny, embezzlement, misappropriation, willful misapplication, or other dishonest act by one or more of its employees; that while said bond was in effect the partnership employed the defendant as a salesman and that subsequently he received for the account of the partnership the sum of \$2,500 which he appropriated to his own use; that the plaintiff, surety company, made good this loss to the partnership. Further, that the defendant, prior to the delivery of the said bond to the partners, executed an indemnity agreement with the surety company in which he agreed to compensate it for any loss it might sustain in his behalf, in consequence of having written the bond in question. It also alleges that it paid a claim, filed by the Kaplan Brothers in the amount of \$2,500, which sum defendant had received for the account of Kaplan Brothers, but which sum defendant had converted to his own use; that the defendant has not reimbursed the surety company and demand is made for the amount due.

An answer was filed in which, among other things, the defendant pleaded that he had no knowledge that the surety company had entered into bond with the said partners to indemnify them against loss as the complaint alleged; and that he had no knowledge that the said bond was in force and effect. He denied he was an employee but asserted that he was a partner. He denied the misappropriation of the sum specified; denied that the

surety company had reimbursed the partnership and said further that if he executed any indemnity agreement it was not applicable to the several allegations of the complaint; and he further denied the truth of the plaintiff's allegation that he, the defendant, had not paid the surety company the said sum of \$2,500. Under the head of affirmative defenses he pleaded that he and Kaplan Brothers had entered into a partnership arrangement as a result of which they were indebted to him in large sums of money for which they failed to account and, further, that he had filed a bill in the Court of Chancery against Kaplan Brothers for an accounting which suit he says was "terminated by agreement between the parties."

The answer was challenged on the ground that it was frivolous "in that it did not set forth a defense to the said action." Accompanying the notice which was served on counsel for the defendant was an affidavit of the vice-president of the plaintiff corporation which contained a complete, particularized verification of each and every material allegation in the complaint as well as this statement: "The defendant did not request the plaintiff to litigate the claim (*i.e.*, the claim of Kaplan Brothers v. The Bonding Company) nor did he deposit or offer to deposit with plaintiff collateral satisfactory to it in kind and amount." The significance of this averment in the affidavit will presently appear. Attached to the affidavit was defendant's application for a fidelity bond, in which an agreement of indemnification was contained, signed by the defendant on April 24th, 1941, one day prior to the date of the surety company's bond in favor of Kaplan Brothers. Therein the defendant stated that he was an employee of Kaplan Brothers. The answers made by him to questions on the application for bond disclosed his financial worth, his domestic situation, and the names of certain persons as references. The last part of this application contained the indemnity agreement with the surety. By its provisions, among other things, the surety was given the right to adjust, settle or compromise any claim under the bond unless the applicant requested the surety to litigate such claim, in which event the applicant was obliged to deposit with the surety collateral satisfactory to it in kind and amount. That this agreement was executed by the defendant is not questioned. As a matter of fact, no answering proof was advanced by him.

The court determined that the defendant's answer "unsupported by affidavit, . . . is insufficient in law" and it was struck out. In the appeal certain objections against the order made by the learned trial judge are urged, to this effect; that the answer was not frivolous; that the court should not have enter-

tained the plaintiff's motion; that it was without jurisdiction to strike the defendant's "answer as sham on plaintiff's motion that it was frivolous;" further, that the court gave judgment on a cause of action different from that pleaded in the complaint and, finally, that the court denied opportunity to "plead to and defend the cause of action on which the judgment was entered."

We find no merit in any of these contentions. It is true that the answer was attacked as "frivolous in that it does not set forth a defense to said action . . .," and it is also true that the order of the court striking down the answer characterized it as "insufficient in law" which, in the statutory connotation, imports the quality of "frivolous." *R. S. 2:27-124*.¹ But the statute, *R. S. 2:27-363*, also ordains that a judgment shall not be reversed for misdirection . . . or for error as to matters of pleading or procedure, unless after examination of the whole case, it appears that the error injuriously affected the substantial rights of a party. We must be concerned with the propriety of the judicial action, not the soundness of the reason which prompted it. *McCarthy v. West Hoboken*, 93 N.J.L. 247, 107 A. 265. The essential thing was the striking out the answer not that it was done for such and such a reason. *National Surety Co. v. Mulligan*, 105 Id. 336, 146 A. 372. There is a superabundance of authority for this principle. On this challenge to the answer the appellant was entirely informed of the reasons that would be presented to the trial court in demonstration of its lack of merit. All of this was set forth in precise detail in the affidavit, the bond application, and the indemnity agreement attached to the notice of motion. It is not said that opportunity was denied the defendant to meet the facts thus advanced. The efficacy of the judgment should not be impaired so long as it appears that the answer was in fact sham and that opportunity to meet this issue was not denied the defendant. *Fidelity Union Trust Co. v. Decker, &c., et al.*, 106 Id. 132, 148 A. 717.

¹ Cf. *Sherrill v. Stewart*, 197 Miss. 880, 898-899, 21 So.2d 11 (1945): "It will be noted that this motion embraces in a single attack upon his plea both the grounds that it was a sham and that it was frivolous. The two grounds are inconsistent and a plea can not be both a sham and frivolous at the same time. . . . A frivolous plea as defined in *Corpus Juris*, under the Chapter on Pleadings, Vol. 49, Section 225, at page 195, is one where 'conceding it to be true it does not, taken as a whole, contain any defense to any part of complainant's cause of action and its insufficiency as a defense is so glaring that the Court can determine it upon a bare inspection without argument. If argument is necessary to convince the Court of the bad faith of the pleader or the insufficiency of the plea it can not be held to be frivolous. . . . The only test is whether or not it denies any material allegations of the complaint or sets up any defense.'

"Whether an answer is frivolous or not is usually determined by mere inspection, and if argument is necessary to convince the Court of the frivolous character of the answer or its bad faith, then the answer can not be said to be frivolous. In this case the argument in the briefs on this question is voluminous and we cannot say upon a bare inspection of the Special Plea No. 2 that it is frivolous. Therefore, in our judgment, the plea was not a frivolous one."

It is next said that it was error on the part of the court to entertain the plaintiff's motion. The argument is that the alleged infirmity of the answer was not expressed in the motion in the language of the statute. It is true that the statutory language was not used. As a matter of good practice the words of the statute should be used. But it cannot be argued with any show of substance that the appellant was surprised or deceived by the technical deficiency of the plaintiff's notice of motion. The affidavit and the exhibit attached fully exposed the infirmity of the answer. Compare *Fidelity Union Co. v. Decker*, *supra*. See *Holdman v. Tansey*, 107 N. J. L. 378, 151 A. 873 (affirming 8 N.J. Misc. 73, 148 A. 195); *Sculthorpe v. Commonwealth Casualty Co.*, 98 N. J. L. 845, 121 A. 751. The plaintiff's action was one to recover on a liquidated demand arising upon express contract and in that situation, under our practice, an answer may be struck out and judgment final may be entered upon motion and affidavit unless the defendant, by affidavit or other proofs, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend (Supreme Court rule 80).² In this case nothing was interposed that would entitle the appellant to defend and there is no contention to the contrary. Nor was the action of the trial court in striking out the answer tantamount to a denial of an opportunity to plead. Striking out a sham or frivolous plea is not an infringement of the right of trial by jury. A plea of general issue, although it denies the entire claim of the plaintiff and apparently raises a question of fact, is not protected for that reason against a motion to strike out, if found to be false. *Coykendall v. Robinson*, 39 Id. 98; *Eisele & King v. Raphael*, 90 Id. 219, 223, 101 A. 200; *Wittmann v. Giele*, 99 Id. 478, 123 A. 716.

One other point should be mentioned. In support of the argument that the court was without jurisdiction to strike the answer as sham when the plaintiff's motion charged that it was frivolous, the statute, R. S. 2:27-114, is invoked, which provided: "The notice of a motion to strike out any pleading or any part thereof shall contain a particular statement of the defects in or objections to such pleading on which the party giving the notice intends to rely, and matters not specified in the notice shall not be considered upon the hearing."

² This rule provides: "When an answer is filed in an action brought to recover a debt or liquidated demand arising—

"(a) Upon contract express or implied, sealed or not sealed; or,

"(b) Upon a judgment for a stated sum; or

"(c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

It has always been the law of this state that the power of the court to strike out improper pleadings is inherent in the court and is not a creature of statute; *cf. Allen v. Wheeler*, 21 N. J. L. 93; this power was exercised by courts at common law; further, since the power existed before the formation of our constitution, a statute cannot defeat it. *Coykendall v. Robinson*, *supra*. Therefore the circumstance that the statute, *supra*, indicates that defective pleadings are to be struck out on notice, and therefore presumably on motion, imports no effective limitation upon the power frequently exercised by the court in plain cases, to strike out of its own motion a pleading that is manifestly improper. *Mount Pleasant Cemetery Co. v. Erie Railroad*, 74 N. J. L. 103, 104, 65 A. 192. Finally, the answer in the instant case was manifestly improper and in the light of the unchallenged proof it was right to strike it out.

The judgment under review should be affirmed.³

NOTE

Kullgren v. Navy Gas & Supply Co., 112 Colo. 331, 149 P. 2d 653 (1944): "This is a suit in behalf of a corporation by one of its stockholders. The corporation and its directors and officers are parties defendant . . . Three of the defendants, proceeding 'individually, and as officers and directors' of the corporation, and denominating the complaint as 'sham,' filed a motion to dismiss the cause, the basis of which was that during the time of the alleged wrongdoings of the moving defendants, plaintiff himself was a director . . . , and, if wrong obtained, plaintiff . . . participated therein . . . The motion was supported [and opposed] by affidavits." Judgment sustaining the motion reversed. (i) "When a stockholder, as a director of the company, participates in an act prejudicial to the interests of non-participating stockholders, and later recants, making an effort to correct the wrong, a court of equity will not deny relief, but will compel the directors to do justice in the interests of all stockholders. The relief thus accorded is not personal. . . ." (ii) "In the terminology of the Code of Civil Procedure, only in relation to an answer to a complaint is the word 'sham' employed. 'Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial or insufficient may be stricken out, on motion, on such terms as the court in its discretion may impose.' Code, § 66. What a complaint shall contain is defined in section 55 of the Code, and for reasons appearing upon its face, a complaint may be challenged for sufficiency by demurrer. Code, § 56. If not so appearing, the challenge may be by answer. Code, § 60. In the absence of statute,

³ Cf. *Davis v. Burnett*, 24 N. J. Misc. 143, 47 A.2d 436 (1946). For other recent cases in which negative defenses have been stricken out as sham, see *Simons v. Schwartz*, 197 Minn. 160, 266 N.W. 444 (1936); *Ocean Forest Co. v. Woodside*, 184 S.C. 428, 192 S.E. 413 (1937).

the rules relating to sham answers may not apply to a complaint. 49 C. J., p. 137, § 141.”⁴

O'DONNELL v. LESSELYOUNG

Supreme Court of Minnesota, 1921. 150 Minn. 318, 185 N.W. 289.

DIBELL, J. Action on a promissory note made by the defendant to one Clark and alleged to have been indorsed to the plaintiff for value before maturity. The defendant appeals from an order striking out his answer as sham.

The answer contains a general denial. It admits the making of the note. It alleges a defense good against Clark. It cannot be urged seriously that the answer, so far as it alleges a defense good against Clark, is sham. The general denial puts in issue the transfer to the plaintiff, and it specifically alleges that the plaintiff is not the owner of the note, but that Clark is. The real controversy on the motion is over the transfer to the plaintiff as a bona fide holder.

The affidavits of Clark and of the plaintiff state that the note was indorsed by the plaintiff in part payment of his services as attorney for Clark in an action in the Federal court, and both say that the defendant, after the note became due, promised to pay the plaintiff. The defendant in his affidavit says that Clark called at his office after the maturity of the note in reference to its collection; that he stated that he had not transferred it to the plaintiff in payment of services; that the plaintiff was not his attorney in the Federal court; and that he had left the note with him for collection. The defendant is in part corroborated by the affidavit of one Sheehan. He fails to deny the promise to pay the plaintiff.

If cases were tried on affidavits, and reviewed on appeal as now, we would sustain a finding for the plaintiff, or trying the case ourselves on affidavits we might find for him. On a motion to strike out as sham, it is for the court to determine whether there is an issue to try, not to try the issue. 2 Dunnell, Minn. Dig. § 7657, et seq. The affidavits do not clearly show that the answer is false. The defendant is entitled to a trial in the ordinary way.¹

⁴ Cf. *Arnold v. Hibernia Savings & Loan Society*, 23 Cal.2d 741, 146 P.2d 684 (1944); N.J. Stat. Ann. § 2:27-125, *supra* p. 564.

¹ Cf. *Kirk v. Welch*, 212 Minn. 300, 304, 3 N.W.2d 426 (1942): “The motion to strike [an answer as sham] was never intended as a substitute for a trial. Its true purpose is to determine whether there is an issue to try. If there is such an issue, it must be determined by trial, not by motion. Therefore the court should be careful to limit its decision accordingly and not determine controverted issues of fact upon affidavits in passing on a motion rather than by trial with confrontation

The motion was made on the additional ground that the answer is frivolous. It is clearly not so and we do not understand that the plaintiff seriously contends that it is.

Order reversed.

NEW YORK RULES OF CIVIL PRACTICE

Rule 113. Summary judgment. When an answer is served in an action,

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or demand arising on a judgment for a sum of money; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed;

the complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial

and examination of witnesses. . . . The falsity of a pleading may be shown by affidavit. But the showing must be clear and unequivocal."

of the issues. If upon such motion it shall appear that the opposing party is entitled to judgment, the judge hearing the motion may award judgment, even in the absence of a cross-motion therefor.¹

NOTE

Dwan v. Massarene, 199 App. Div. 872, 877-878, 192 N. Y. S. 577 (1st Dep't 1922): If Wayland v. Tysen (*supra* p. 560) had not overruled People v. McCumber (*supra* p. 560, note 1), "the adoption of rule 113 would have been unnecessary." The condition of the practice in New York when the convention to consider and adopt rules of civil practice met, was that "an issue raised by a false affirmative defense could be tested by a motion to strike out as sham, and an issue raised by a false denial could not; and a denial of knowledge or information sufficient to form a belief, which was presumptively false, would authorize the granting of a judgment against the defendant, and the same form of denial that was actually false, was immune from attack." "[T]hese were distinctions that seem to lack substance, and to be contrary to the intent and purpose of Code pleading, which was to do away with the technical and artificial issues of the common-law system, and substitute a system of pleading based upon a statement of the facts of the cause of action, and truthful denials thereof or defenses thereto. A fictitious denial, the effect of which was merely intended to force the plaintiff to prove his cause before a jury has no place in the Code system of pleading. It was a relic of the artificial common-law pleading, which had persisted because of the resistance of the courts to the expressed will of the Legislature. With the intention of doing away with this technicality and fruitful source of delay and expense to the enforcement of a just and legal claim to which there was no defense in fact, the convention adopted rules 113 and 114."²

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment

¹ The remaining paragraphs of this rule provide in substance (1) that if in any action of the 3rd, 4th and 5th types no triable issue other than that of the amount of damages for which judgment should be granted, is shown to exist, the judge shall order an assessment immediately to determine the amount of damages and render judgment as soon as the amount is assessed; (2) that if in any action of the 6th, 7th or 8th types the judge is convinced that there is no preliminary triable issue, the court shall forthwith render an appropriate judgment or order, and the action shall proceed thenceforth in the ordinary course; (3) that if an answer is served in any sort of action, whether or not it is of one of the types enumerated by the rule, and if it states a defense which is both sufficient in law and founded upon facts established prima facie by documentary evidence, the complaint may on motion be dismissed unless the plaintiff shall show such facts as, in the judge's opinion, are sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record; (4) that the rule shall be applicable to counterclaims; and (5) that it shall be applicable as between co-defendants.

² Rule 114 provides for "partial" summary judgments.

may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavit of a party opposing the motion that he cannot for

reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

PROBLEM

The chief problem involved in the administration of the summary judgment procedure is the criterion or criteria by which courts do and should determine whether or not there is a triable material issue of fact. You should attempt to state what criterion or criteria were employed for that purpose in the following cases, which are intended only to introduce you to the problem. You will explore it further in the advanced course in Civil Procedure.

ENGL v. AETNA LIFE INSURANCE COMPANY

Circuit Court of Appeals of the United States, Second Circuit, 1943.
139 F.2d 469.

CLARK, CIRCUIT JUDGE.¹ Defendant's defense to plaintiff's claim as beneficiary of three insurance policies totalling \$8,000 upon the life of her deceased husband is based upon the contention that in applying for the insurance the insured had misrepresented the facts as to consultations he had had with physicians. After defendant had filed its answer herein wherein it raised this defense by detailed allegations and showed a tender of premiums paid, it then proceeded to take the depositions of two physicians, who testified that deceased had in fact consulted them, but not as to the reasons for or nature of such consultations, since plaintiff claimed her statutory privilege (New York Civil Practice Act, § 352,² applying also in the federal court below, Connecticut

¹ All footnotes, except note 2, are the Court's.

² [This section provides: "Physicians, dentists and nurses not to disclose professional information. A person duly authorized to practice physic or surgery, or dentistry, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, in cases where the disclosure of the information so acquired by a dentist is necessary for identification purposes, in which case the dentist may be required to testify solely with respect thereto, or unless, where the patient is a child under the age of six-

Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708) that these were confidential communications. Thereafter defendant moved for summary judgment, which the district court granted. Plaintiff's appeal contends that she was not compelled to disclose her case in advance of trial, and specifically that she was not required, before that time, to waive her privilege as to permitting the doctors to testify, and thus could rely until then upon the possibility that the doctors might show the consultations to have been on inconsequential ailments.

The deceased took out the policies, which became incontestable after two years, in November, 1941. He died on April 8, 1942. By their terms the policies made the written statements of the deceased in his application "representations" and within the provisions of New York Insurance Law, Consol. Laws, c. 28, § 149, as amended in 1939, dealing with "Representations by the insured." See Patterson, The Insurance Law Revision of 1939, 11 N. Y. St. Bar Bull. 135. The question and answer here particularly involved are as follows: "10.1. When and for what reason did you last consult a physician?" "Pleurisy (dry) 1921. Brief. Due to exposure *only*. 1921. Dr. ———? Berlin." Other questions and answers involved are the question whether he had ever consulted a physician for or suffered from any disease of "Stomach, Intestines, Liver, Kidneys or Bladder," with the answer "No," the question, "Have you had regular or occasional health examinations?" with a like answer, and the further questions immediately following, "Date of last? ———" and "By Dr. ———" with lines drawn after them to show negative answers to them.

The depositions of Drs. Schur and Bernstein brought out that the deceased had in fact consulted Dr. Schur on March 26, May 28, and June 20, 1940 (in addition to other visits particularly for his wife), that the doctor had prescribed for him and had referred him to Dr. Bernstein, a radiologist, for X-rays, and that Dr. Bernstein in May, 1940, had taken six X-rays of the insured's gall bladder over a period of three days after he had followed a certain preparatory diet. (That the part of the insured's body X-rayed was in fact the gall bladder was received only under motion to strike, but it would seem admissible under the rule that the statutory privilege does not extend to matters observable by any third person if present. *Klein v. Prudential Ins. Co.*, 221 N. Y. 449, 453, 117 N. E. 942.) All other questions as to the object of the consultation or details thereof, as well as questions as to gall bladder pathology, were left unanswered because of plaintiff's

teen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician, dentist or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry."]'

insistence on her privilege, plaintiff's counsel stating that he reserved the right of cross-examination of these witnesses until the trial. Defendant's affidavit on its motion for summary judgment brought these depositions to the attention of the court, and a further affidavit of its associate medical director showed that he had approved the deceased's application for life insurance and that he would not have done so had he known of the fact of these consultations and the taking of the X-ray photographs. Plaintiff, in opposition to the motion, submitted only her own affidavit to the effect that it had been the custom of herself and her husband to submit to annual physical examinations while living in Germany, that after coming to this country in 1938 she had suggested such a check-up here, and that the examinations in question, as well as the taking of the X-rays, were only routine medical check-ups such as she and her husband had had before in Germany.

New York Insurance Law, § 149 provides in its sub. 2 that misrepresentations shall not defeat recovery on the policy unless material and shall be deemed material only if the insurer would not have made the contract except for reliance upon the misrepresentations, and in sub. 4 that a misrepresentation that an applicant has not had previous medical treatment shall be deemed a misrepresentation that the applicant has not had the disease for which such treatment was given, concluding with this pertinent sentence: "If in any action to rescind any such contract or to recover thereon, any such misrepresentation is proved by the insurer, and the insured or any other person having or claiming a right under such contract shall prevent full disclosure and proof of the nature of such medical impairment, such misrepresentation shall be presumed to have been material." The district court, in granting judgment, held that plaintiff had prevented full disclosure, that the presumption therefore operated, and that plaintiff's own affidavit was not enough to explain the visits to and the X-rays of the physicians, citing particularly *Anderson v. Aetna Life Ins. Co.* 265 N. Y. 376, 380, 193 N. E. 181, 182, where the court had said that cases calling for an X-ray examination "can scarcely be presumed to mere temporary disorders, having no bearing upon general health." It therefore held the misrepresentations to be material as a matter of law and to avoid the policies.

In view of this pertinent New York law there can be no doubt that if the state of the evidence at a trial should be as is above disclosed a judgment for defendant must necessarily follow; and if a jury were present, there would be error in failing to direct a verdict. This in effect plaintiff concedes by basing her argu-

ment upon the claim that her case is not to be viewed as it would be at trial. For this she cites and relies on Federal Rule 26 (b), 28 U. S. C. A. following section 723 c, which provides as to the "scope" of examination before trial that it shall be only as to relevant matter "not privileged." And the steps in her argument are that, since examination before trial of the physicians on these matters could not be compelled, she might therefore wait until trial to determine whether to make use of their testimony. Of course, she, or at least the deceased's "personal representatives," had the undoubted right to waive the privilege. New York Civil Practice Act, § 354, permitting waiver "upon the trial or examination"; *Capron v. Douglass*, 193 N. Y. 11, 85 N. E 827, 20 L. R. A., N. S., 1003; *Lorde v. Guardian Life Ins. Co.*, 252 App. Div. 646, 300 N. Y. S. 721. But it is a complete non sequitur to say that this federal rule has such an extensive application as to control, and, as we believe, largely to nullify, another federal rule more directly involved, namely, Rule 56, concerning summary judgments.

The limitation of Federal Rule 26 (b) of the scope of examination before trial to relevant matter not privileged has a quite different objective from that visualized in the plaintiff's argument. For by the extensive discovery practice of the new rules, examination before trial may be had not merely for the purpose of producing evidence to be used at the trial, but also for discovery of evidence, indeed, for leads as to where evidence may be located. Thus sub. (a) of Rule 26 expressly states that examination may be had "for the purpose of discovery or for use as evidence in the action or for both purposes," and sub. (b), dealing with the "scope of examination," authorizes it as to, among other things, "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts"; while the use of the testimony secured in evidence is governed by an entirely separate provision, sub. (d), setting forth various rules of admissibility. This dual nature of the discovery procedure, one of the most important parts of the new system, has been widely commented upon and its value frequently attested.³ Subdivision (b), therefore, extends much

³ See Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 Col. L. Rev. 1179, 1187, 1436, 1440-1443; Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 Ill. L. Rev. 1, 3-8; Pike and Willis, *Federal Discovery in Operation*, 7 U. of Chi. L. Rev. 297, 309-318; Pike, *Some Current Trends in the Construction of the Federal Rules*, 9 Geo. Wash. L. Rev. 26, 41; Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205; Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 St. John's L. Rev. 1, 11; Hincks, J., in *Lewis v. United Air Lines Transport Corp.*, D. C. Conn., 27 F. Supp. 946.

beyond sub. (d) in allowing examination into matters which may not be admissible in evidence. But to guard against abuse by inquiry into matters protected by law, *Woernley v. Electronic Typewriters*, 271 N. Y. 228, 2 N. E. 2d 638; *Lorde v. Guardian Life Ins. Co.*, supra, it was obviously necessary to add the quoted language recognizing existing common-law and statutory privileges as to confidential communications.

There is nothing in this history, however, to suggest that the respect thus shown to a privileged communication should limit the procedure under a different rule, namely, that for summary judgment under Federal Rule 56. The express language of Rule 56, read in its natural context, is to the contrary, for sub. (c) provides that "the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Here the depositions, taken at their face value, and construed in the light of the underlying law of the state, show that there is no genuine issue of material fact and support the judgment rendered.

But the matter is sufficiently important so that we should go beyond the bare words of the summary-judgment rule to the reasons behind it. The federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants and in all forms and kinds of civil actions. But the history of the development of this procedure shows that it is intended to permit "a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried." 3 *Moore's Federal Practice* 3175. In New York the question of constitutionality was settled by considering the procedure as one to determine whether a defense or issue formally stated between the parties was merely sham and not bona fide. Formerly this could be determined only on the face of the pleadings; the only essentially new step was to allow such a showing to be made on the basis of detailed affidavits. The rationale is well stated in one of the leading cases establishing constitutionality, *Hanna v. Mitchell*, 202 App. Div. 504, 518, 196 N. Y. S. 43, 55, affirmed 235 N. Y. 534, 139 N. E. 724: "To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury,

although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance."⁴ Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. [Citations omitted.]

In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back, to controvert the legal deduction from the New York statute and decisions that the conceded misrepresentations of the application are material. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity "to pierce the allegations of fact in the pleadings" or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Judgment affirmed.

ARNSTEIN v. PORTER

Circuit Court of Appeals of the United States, Second Circuit, 1946.
154 F.2d 464.

Plaintiff, a citizen and resident of New York, brought this suit, charging infringement by defendant, a citizen and resident of New York, of plaintiff's copyrights to several musical compositions, infringement of his rights to other uncopyrighted musical compositions, and wrongful use of the titles of others. Plaintiff, when filing his complaint, demanded a jury trial. Plaintiff took the deposition of defendant, and defendant, the deposition of plaintiff. Defendant then moved for an order striking out plaintiff's jury demand, and for summary judgment. Attached to defendant's motion papers were the depositions, phonograph records of piano renditions of the plaintiff's compositions and defendant's alleged infringing compositions, and the court records of

⁴ Thus, Mr. Justice Shientag, in his illuminating article, Summary Judgment, 4 Fordham L. Rev. 186, states at page 201 that "one moving for summary judgment should be prepared to put his cards on the table, and to anticipate a defense which may be interposed," and, at pages 205-207, that the opposing affidavits must go fully into the facts or, as Lord Blackburn said in Wallingford v. Directors, etc., of the Mutual Soc., 5 App. Cas. 685, 704, they must "condescend upon particulars." See, also, Clark, Summary Judgments, 25 J. Am. Jud. Soc. 20, 1942 Handbk. Nat. Conf. of Judicial Councils 55, together with the cases there cited.

five previous copyright infringement suits brought by plaintiff in the court below against other persons, in which judgments had been entered, after trials, against plaintiff. Defendant also moved for dismissal of the action on the ground of "vexatiousness."

Plaintiff alleged that defendant's "Begin the Beguine" is a plagiarism from plaintiff's "The Lord Is My Shepherd" and "A Mother's Prayer." Plaintiff testified, on deposition, that "The Lord Is My Shepherd" had been published and about 2,000 copies sold, that "A Mother's Prayer" had been published, over a million copies having been sold. In his depositions, he gave no direct evidence that defendant saw or heard these compositions. He also alleged that defendant's "My Heart Belongs to Daddy" had been plagiarized from plaintiff's "A Mother's Prayer."

Plaintiff also alleged that defendant's "I Love You" is a plagiarism from plaintiff's composition "La Priere," stating in his deposition that the latter composition had been sold. He gave no direct proof that plaintiff knew of this composition.

He also alleged that defendant's song "Night and Day" is a plagiarism of plaintiff's song "I Love You Madly," which he testified had not been published but had once been publicly performed over the radio, copies having been sent to divers radio stations but none to defendant; a copy of this song, plaintiff testified, had been stolen from his room. He also alleged that "I Love You Madly" was in part plagiarized from "La Priere." He further alleged that defendant's "You'd Be So Nice To Come Home To" is plagiarized from plaintiff's "Sadness Overwhelms My Soul." He testified that this song had never been published or publicly performed but that copies had been sent to a movie producer and to several publishers. He also alleged that defendant's "Don't Fence Me In" is a plagiarism of plaintiff's song "A Modern Messiah" which has not been published or publicly performed; in his deposition he said that about a hundred copies had been sent to divers radio stations and band leaders but that he sent no copy to defendant. Plaintiff said that defendant "had stooges right along to follow me, watch me, and live in the same apartment with me," and that plaintiff's room had been ransacked on several occasions. Asked how he knew that defendant had anything to do with any of these "burglaries," plaintiff said, "I don't know that he had to do with it, but I only know that he could have." He also said " . . . many of my compositions had been published. No one had to break in to steal them. They were sung publicly."

Defendant in his deposition categorically denied that he had ever seen or heard any of plaintiff's compositions or had had any acquaintance with any persons said to have stolen any of them.

The prayer of plaintiff's original complaint asked "at least one million dollars out of the millions the defendant has earned and is earning out of all the plagiarism." In his amended complaint the prayer is "for judgment against the defendant in the sum of \$1,000,000 as damages sustained by the plagiarism of all the compositions named in the complaint." Plaintiff, not a lawyer, appeared pro se below and on this appeal.

FRANK, CIRCUIT JUDGE.¹ . . . The principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action. The answer depends on whether "there is the slightest doubt as to the facts." *Doehler Metal Furniture Co. v. United States*, 2 Cir., 149 F. 2d 130, 135; *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; *Arenas v. United States*, 322 U. S. 419, 434, 64 S. Ct. 1090, 88 L. Ed. 1363; *Associated Press v. United States*, 326 U. S. 1, 6, 7, 65 S. Ct. 1416; see discussion below, note [4]. In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation. . . .

Each of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts—of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions. . . .

We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant, we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.

Summary judgment was, then, proper if indubitably defendant did not have access to plaintiff's compositions. Plainly that presents an issue of fact. On that issue, the district judge, who

¹ [All footnotes except the last, are those of the judges who wrote the opinions. Some of their footnotes have been omitted. Those retained have been re-numbered.]

heard no oral testimony, had before him the depositions of plaintiff and defendant. The judge characterized plaintiff's story as "fantastic"; and, in the light of the references in his opinion to defendant's deposition, the judge obviously accepted defendant's denial of access and copying. Although part of plaintiff's testimony on deposition (as to "stooges" and the like) does seem "fantastic," yet plaintiff's credibility, even as to those improbabilities, should be left to the jury. If evidence is "of a kind that greatly taxes the credulity of the judge, he can say so, or, if he totally disbelieves it, he may announce that fact, leaving the jury free to believe it or not."² If, said Winslow, J., "evidence is to be always disbelieved because the story told seems remarkable or impossible, then a party whose rights depend on the proof of some facts out of the usual course of events will always be denied justice simply because his story is improbable."³ We should not overlook the shrewd proverbial admonition that sometimes truth is stranger than fiction.

But even if we were to disregard the improbable aspects of plaintiff's story, there remain parts by no means "fantastic." On the record now before us, more than a million copies of one of his compositions were sold; copies of others were sold in smaller quantities or distributed to radio stations or band leaders or publishers, or the pieces were publicly performed. If, after hearing both parties testify, the jury disbelieves defendant's denials, it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the "crucial test of credibility"—in the presence of the jury. Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief.

To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury. For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. . . .

² *Post v. United States*, 5 Cir., 135 F. 1, 11, 70 L.R.A. 989. . . .

³ *Marston v. Dresen*, 85 Wis. 530, 535, 55 N.W. 896, 899.

With all that in mind, we cannot now say—as we think we must say to sustain a summary judgment—that at the close of a trial the judge could properly direct a verdict.⁴

We agree that there are cases in which a trial would be farcical. If, in a suit on a promissory note, the defendant, pleading payment, sets forth in an affidavit his cancelled check to the order of the plaintiff for the full amount due on the note and a written receipt in full signed by the plaintiff, while plaintiff in a reply affidavit merely states that he did not receive payment and suggests no other proof, then to require a trial would be absurd; for cross-examination of the defendant in such circumstances clearly would be futile.⁵ But where, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge. Illustrative of the dangers, in this respect, of summary judgments, if not cautiously employed, is a recent case in the court below. There the judge refused to grant summary judgment for defendants, despite a mass of impressive affidavits, containing copies of corporate records, the accuracy of which plaintiffs did not deny in their affidavits, and which on their face made plaintiffs' case seem nothing but a sham; at the trial, however, cross-examination of the defendants revealed facts, theretofore unknown by plaintiffs, that so riddled the defendants' case as it had previously appeared on the summary judgment motion that the judge entered judgment against them for several million dollars, from which they did not appeal.

⁴ See *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 624, 627, 64 S. Ct. 724, 88 L. Ed. 967. . . .

That the comment in the *Sartor* case is not to be restricted to the issue of damages is shown by *Associated Press v. United States*, 326 U.S. 1, 6, 65 S. Ct. 1416, 1418, 89 L. Ed. 2013, where the court said, "We agree that Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them. *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967." . . .

⁵ We do not mean by this illustration that Rule 56 is limited to suits for liquidated claims.

Thus summary judgment would have been proper in the instant case if plaintiff on his deposition had admitted that defendant had no access to plaintiff's compositions or had not copied any substantial and material part of them. Then the case would have been like *Associated Press v. United States*, 326 U.S. 1, 6, 65 S. Ct. 1416, 1418, 89 L. Ed. 2013, i.e., the judgment would have been based solely upon the consideration of no evidence "which might possibly be in dispute."

We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a "trial by affidavits," if either party objects. That procedure which, so the historians tell us, began to be outmoded at common law in the 16th century, would, if now revived, often favor unduly the party with the more ingenious and better paid lawyer. Grave injustice might easily result. . . .

If defendant, who resides in the district and within a few miles of the place of trial, should seek to substitute his own deposition for his testimony on the stand at the trial, he could not do so under clause 2 of Rule 26 (d) (3), but would be obliged to show "exceptional circumstances" under clause 5. Consequently, mere business convenience prompting his absence would be insufficient; the use of his deposition would have to be justified as desirable "with due regard to the importance of presenting the testimony . . . orally in open court." But no such question is now before us. As no one has suggested that defendant is likely to be absent, we cannot, on the record in this appeal, assume that "exceptional circumstances" will exist when this case comes to trial; no facts appeared to the court below which made it proper for it to proceed on that assumption and to shut off the plaintiff from open-court examination of defendant.

Assuming that adequate proof is made of copying, that is not enough; for there can be "permissible copying," copying which is not illicit. Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians.⁶ The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine. Indeed, even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question.

⁶ Where plaintiff relies on similarities to prove copying (as distinguished from improper appropriation) paper comparisons and the opinions of experts may aid the court.

We should not be taken as saying that a plagiarism case can never arise in which absence of similarities is so patent that a summary judgment for defendant would be correct. Thus suppose that Ravel's "Bolero" or Shostakovitch's "Fifth Symphony" were alleged to infringe "When Irish Eyes Are Smiling."⁷ But this is not such a case. For, after listening to the playing of the respective compositions, we are, at this time, unable to conclude that the likenesses are so trifling that, on the issue of misappropriation, a trial judge could legitimately direct a verdict for defendant.

At the trial, plaintiff may play, or cause to be played, the pieces in such manner that they may seem to a jury to be inexcusably alike, in terms of the way in which lay listeners of such music would be likely to react. The plaintiff may call witnesses whose testimony may aid the jury in reaching its conclusion as to the responses of such audiences. Expert testimony of musicians may also be received, but it will in no way be controlling on the issue of illicit copying, and should be utilized only to assist in determining the reactions of lay auditors. The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation; for the views of such persons are caviar to the general—and plaintiff's and defendant's compositions are not caviar. . . .

CLARK, CIRCUIT JUDGE (dissenting). While the procedure followed below seems to me generally simple and appropriate, the defendant did make one fatal tactical error. In an endeavor to assist us, he caused to be prepared records of all the musical pieces here involved, and presented these transcriptions through the medium of the affidavit of his pianist. Though he himself did not stress these records and properly met plaintiff's claims as to the written music with his own analysis, yet the tinny tinnabulations of the music thus canned resounded through the United States Courthouse to the exclusion of all else, including the real issues in the case. Of course, sound is important in a case of this kind, but it is not so important as to falsify what the eye reports and the mind teaches. Otherwise plagiarism would be suggested by the mere drumming of repetitious sound from our usual popular music, as it issues from a piano, orchestra, or hurdy-gurdy—particularly when ears may be dulled by long usage, possibly artistic repugnance or boredom, or mere distance which causes all sounds to merge. And the judicial eardrum may be peculiarly insensitive after long years of listening to the

⁷ In such a case, the complete absence of similarity would negate both copying and improper appropriation.

"beat, beat, beat" (I find myself plagiarizing from defendant and thus in danger of my brothers' doom) of sound upon it, though perhaps no more so than the ordinary citizen juror—even if tone deafness is made a disqualification for jury service, as advocated.

Pointing to the adscititious fortuity inherent in the stated standard is, it seems to me, the fact that after repeated hearings of the records, I could not find therein what my brothers found. The only thing definitely mentioned seemed to be the repetitive use of the note e^2 in certain places by both plaintiff and defendant, surely too simple and ordinary a device of composition to be significant. In our former musical plagiarism cases we have, naturally, relied on what seemed the total sound effect; but we have also analyzed the music enough to make sure of an intelligible and intellectual decision. . . .

Consequently, I do not think we should abolish the use of the intellect here even if we could. When, however, we start with an examination of the written and printed material supplied by the plaintiff in his complaint and exhibits, we find at once that he does not and cannot claim extensive copying, measure by measure, of his compositions. . . .

Though it is most instructive, it will serve no good purpose for me to restate here this showing as to each of the pieces in issue. As an example of the rest, we may take plaintiff's first cause of action. This involves his "A Modern Messiah" with defendant's "Don't Fence Me In." The first is written in 6/8 time, the second in common or 4/4 time; and there is only one place where there is a common sequence of as many as five consecutive notes, and these without the same values. Thus it goes. The usual claim seems to be rested upon a sequence of three, of four, or of five—never more than five—identical notes, usually of different rhythmical values. . . .

In the light of these utmost claims of the plaintiff, I do not see a legal basis for the claim of plagiarism. So far as I have been able to discover, no earlier case approaches the holding that a simple and trite sequence of this type, even if copying may seem indicated, constitutes proof either of access or of plagiarism. . . . That being so, the procedure whereby the demonstration is made does not seem to me overimportant. A court is a court whether sitting at motion or day calendar; and when an issue of law is decisively framed, it is its judicial duty to pass judgment. Hence, on the precedents I should feel dismissal required on the face of the complaint and exhibits.

But of course as the record now stands, the case is still stronger, for it appears that access must rest only upon a showing of similarities in the compositions. Under the procedure employed, the parties were entitled to require discovery of the case relied on by the other. . . . This they did by each taking the deposition of the other, resulting in a categorical denial by defendant of having ever seen or heard plaintiff's compositions and no showing by plaintiff of any evidence of access worthy of submission to any trier of fact.⁸ And I take it as conceded that these trifling bits of similarities will not permit of the inference of copying. My brothers, in a trusting belief in the virtues of cross-examination, rely upon a trial to develop more. But cross-examination can hardly construct a whole case without some factual basis on which to start. And they overlook, too, the operation of F.R. 26(d)(3) 2, as to the use of depositions, under which the defendant, if elsewhere on business, need not return for trial, but may rely upon his already clear deposition, and the plaintiff may not have the luxury of another futile cross-examination. Further, my brothers reject as "utterly immaterial" the help of musical experts as to the music itself (as distinguished from what lay auditors may think of it, where, for my part, I should think their competence least), contrary to what I had supposed was universal practice, . . . thereby adding a final proof of the anti-intellectual and book-burning nature of their decision. Thus it seems quite likely that the record at trial will be the one now before us.

Since the legal issue seems thus clear to me, I am loath to believe that my colleagues will uphold a final judgment of plagiarism on a record such as this. The present holding is therefore one of those procedural mountains which develop where it is thought that justice must be temporarily sacrificed, lest a mistaken precedent be set at large. The conclusion that the precedent would be mistaken appears to rest on two premises: a belief in the efficacy of the jury to settle issues of plagiarism, and a dislike of the rule established by the Supreme Court as to summary judgments. Now, as to the first, I am not one to condemn jury trials (cf. *Keller v. Brooklyn Bus Corp.*, 2 Cir., 128 F. 2d 510, 517; *Frank, If Men Were Angels*, 1942, 80-101; *Frank, Law and the Modern Mind*, 1930, 170-185, 302-309, 344-348), since I think it has a place among other quite finite methods of fact-finding. But I should not have thought it pre-eminently fitted to decide ques-

⁸ Even his vague and reckless charge of burglary of his various rooming places—a repeated feature of his plagiarism cases, see, e.g., *Arnstein v. American Soc. of Composers, Authors and Publishers*, D.C.S.D.N.Y., 29 F. Supp. 388, 391, 392; *Arnstein v. Twentieth Century Fox Film Corp.*, D.C.S.D.N.Y., 52 F. Supp. 114—upon cross-examination dissolved into nothing so far as this defendant is concerned.

tions of musical values, certainly not so much so that an advisory jury should be brought in if no other is available. And I should myself hesitate to utter so clear an invitation to exploitation of slight musical analogies by clever musical tricks in the hope of getting juries hereafter in this circuit to divide the wealth of Tin Pan Alley. This holding seems to me an invitation to the strike *sui par excellence*.

The second premise—dislike of the summary-judgment rule—I find difficult to appraise or understand. Seemingly the procedure is not to be generally favored, but with certain exceptions, the extent of which is unclear, e.g., *United States v. Associated Press*, D. C. S. D. N. Y., 52 F. Supp. 362, affirmed *Associated Press v. United States*, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013, a plaintiff's judgment, and *Milcor Steel Co. v. George A. Fuller Co.*, 2 Cir., 122 F. 2d 292, affirmed 316 U. S. 143, 62 S. Ct. 969, 86 L. Ed. 1332, a defendant's judgment in a patent case. And perhaps it is not to be employed at all in plagiarism cases. Since, however, the clear-cut provisions of F. R. 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable (unlike most state summary procedures) or any presumption against its use, it is necessary to refashion the rule. This was announced by way of a dictum in *Doehler Metal Furniture Co. v. United States*, 2 Cir., 149 F. 2d 130, 135, which was specifically directed as a criticism of another decision of this court, *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, [2 Cir., 147 F. 2d 399, certiorari denied 325 U. S. 861, 65 S. Ct. 1201, 89 L. Ed. 1982] (cf., however, 45 Col. L. Rev. 964). Now that dictum is definitely accepted as the "standard here," without reference to the rule itself. That is a novel method of amending rules of procedure. It subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules which shall be uniform throughout the country. Worse still, it is *ad hoc* legislation, dangerous in the particular case where first applied and disturbing to the general procedure.⁹

In fact, however, cases, texts, and articles without dissent accept and approve the summary judgment as an integral and useful part of the procedural system envisaged by the rules. And as the Advisory Committee's two drafts of proposed amendments show, the demand is not for limitation, but for at least a small

⁹ I suggest that a case is not made out for such a departure from tried and approved rule-making procedure. It seems to rest upon somewhat vague references to "trial by affidavits," though this is precluded by the rule itself whenever there is a "genuine issue as to any material fact," F. R. 56 (c), and to some anonymous case where seemingly the trial judge, being pressed to commit error, inconsiderately refused to do so. Had he committed error, the appellate courts and the Supreme Court would have been available for its correction.

extension, of the rule. It is, indeed, more necessary in the system of simple pleading now enforced in the federal courts; for under older procedures, useless and unnecessary trials could be avoided, in theory at least, by the then existing demurrer and motion practice. But that stressed pleading forms, rather than the merits, while summary judgment and its popular correlative, pre-trial procedure, F. R. 16, go directly to the merits. One unfortunate consequence of eliminating summary procedure is that it affords support for the plea of return to the old demurrer, which, however clumsily, did get rid of some of the cases which did not deserve a protracted and expensive trial. Of course it is error to deny trial when there is a genuine dispute of facts;¹⁰ but it is just as much error—perhaps more in cases of hardship, or where impetus is given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated. Plagiarism suits are not excepted from F. R. 56; and often that seems the most useful and direct procedure, since the cases so overwhelmingly turn ultimately and at long length upon an examination and a comparison of the challenged and the challenging compositions. Cf. *MacDonald v. Du Maurier*, 2 Cir., 144 F.2d 696, 701-703. Here I think we ought to assume the responsibility of decision now. If, however, we are going to the other extreme of having all decisions of musical plagiarism made by ear, the more unsophisticated and musically naive the better, then it seems to me we are reversing our own precedents to substitute chaos, judicial as well as musical.¹¹

NOTE

California Apparel Creators v. Wieder of California, 162 F. 2d 894, 902-903 (C. C. A. 2d 1947): Action for unfair competi-

¹⁰ Except in one detail, not altogether the fault of the district judges, their use of summary judgment has been generally discriminating, not deserving the criticism in *Doehler Metal Furniture Co. v. United States*, 2d Cir., 149 F.2d 130, 135. Many of the cases there cited represent real and inevitable differences of legal view. That some other cases require reversal is not a disturbing experience in the shaking down into practice of a new rule, particularly when we note the detail above referred to, which has caused difficulty. That was the unfortunate and unperceived emphasis upon failure to state a claim for relief found in the grounds for the motion to dismiss, F. R. 12 (b), which led some courts to place an undue emphasis upon pleading formalities. But this has already been corrected in the decisions, even without the amendment proposed by the Advisory Committee. Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, May, 1945, Rule 12 (b), and cases cited at pp. 14, 15.

¹¹ [This decision is commented upon in 55 Yale L. J. 810 (1946). Cf. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *State of Washington v. Maricopa County*, 143 F.2d 871 (C.C.A. 9th 1944); *Gucciardi v. Chisholm*, 145 F.2d 514 (C.C.A. 2d 1944); *Burley v. Elgin, Joliet & Eastern Railway Co.*, 140 F.2d 488 (C.C.A. 7th 1943); *Walling v. Fairmont Creamery Co.*, 139 F.2d 318 (C.C.A. 8th 1943); *Radio City Music Hall Corporation v. United States*, 135 F.2d 715 (C.C.A. 2d 1943); *Campana Corporation v. Harrison*, 135 F.2d 334 (C.C.A. 7th 1943); *Firemen's Mutual Insurance Co. v. Aponaug Manufacturing Co.*, 149 F.2d 359 (C.C.A. 5th 1945); *Wilkinson v. Powell*, 149 F. 2d 335 (C.C.A. 5th 1945); *Gifford v. Travelers Protective Ass'n*, 153 F.2d 209 (C.C.A. 9th 1946).]

tion by plaintiffs, a group of manufacturers and dealers in wearing apparel located in the State of California, against manufacturers and dealers in wearing apparel located in New York who used the names "California" and "Californian" in connection with their business. Plaintiffs sought damages and an injunction restraining defendants from using the word "California" or any variant of it in their trade names or in describing their products. Defendants counterclaimed for declaratory judgments that they were entitled to continue to use their trade names. The court rendered summary judgments for defendants on their counterclaims. *Affirmed*, on the ground that plaintiffs did not and could not show that they had been or would be injured by defendants' use of the word "California" in the manner above described. But *cf.* L. Hand, C. J., *dissenting*: "We are affirming a summary judgment cutting off the plaintiffs from any trial because they have not been able in their affidavits to make out a prima facie case. I cannot agree to that. In trials of this kind the issues are as vagrant and vague almost, if not quite, as in prosecutions under the Anti-Trust Acts. In all cases where the fraud is not stark and bare, the issue tried is how an indefinite number of unknown and unascertainable buyers will understand a false advertisement or label. It is the last kind of action in which to invoke the remedy of summary judgment.¹² Indeed, when I see, as I am constantly seeing more and more, the increasing disposition to make use of that remedy, I cannot help wondering whether there is not danger that it may not rather impede, than advance, the administration of justice. It is an easy way for a court with crowded dockets to dispose of them, and the habit of recourse to it readily becomes a denial of that thorough, though dilatory, examination of the facts, on which justice depends even more than upon a studious examination of the law; for a mistake of law can always be reviewed. Speed and hurry ought to be antipodes of judicial behavior."¹³

SECTION 3. THE PROCEDURAL CONSEQUENCES OF NEGATIVE DEFENSES

A. The Creation of Material Issues of Fact

WEBSTER EISENLOHR, INC. v. KALODNER

Circuit Court of Appeals of the United States, Third Circuit, 1944.
145 F.2d 316.

GOODRICH, CIRCUIT JUDGE.¹ The proceedings at bar are upon a petition to this court for writs of mandamus and prohibition to be directed to the Honorable Harry E. Kalodner, one of the

¹² *Cf.* Kennedy v. Silas Mason Co., — U.S. —, 68 S.Ct. 1031, — L.Ed. — (1948).

¹³ See the discussion of the Engl, Arnstein and other cases decided by the same court in Ilsen, *Recent Developments in Federal Practice and Procedure*, in Federal Rules of Civil Procedure 343-349 (West rev. ed. 1947).

¹ All of the court's footnotes except one have been omitted.

Judges of the District Court of the United States for the Eastern District of Pennsylvania, and David Bortin, Esq., a Special Master appointed pursuant to his order.

Judge Kalodner has filed an answer to the petition. Mr. Bortin has filed none.

The essential facts are not in dispute. Andrew J. Speese, 3rd, alleging himself to be a citizen and resident of Texas and the owner of 10 shares of the preferred stock of the petitioner, Webster Eisenlohr, Inc., a Pennsylvania corporation, filed a suit against that company on February 1, 1943, in the District Court of the United States for the Eastern District of Pennsylvania. The action was brought by Speese "for and on behalf of all the preferred stockholders" of Webster Eisenlohr, Inc. The complaint, *inter alia*, described the division of the stock of the company into common and preferred shares and alleged that dividends on the preferred shares had remained unpaid since April 1, 1931, and, as of December 31, 1941, amounted to \$75.25 per share; that the certificate of incorporation of Webster Eisenlohr, Inc., provides that the preferred stock shall not be entitled to vote at any meeting of stockholders, and shall not be entitled to participate in the management of the corporation ". . . unless and only in the event [that] (1) two quarterly dividends payable thereon shall be and remain unpaid and in arrears, . . . whereupon . . . full voting power shall be vested in the preferred stock, until the arrearages of accumulated dividends upon . . . [the] preferred stock shall have been paid. . . ." It was further alleged that at the annual meeting of stockholders of the corporation on March 10, 1942, Speese, acting for himself and as proxy for 815 shares of preferred stock, demanded that the voting power be vested exclusively in the preferred stock and that the corporation, acting through its president, refused the demand and ruled that the preferred stock and common stock together had the voting power to elect directors; that the company persisted in this attitude despite frequent demands of Speese and other preferred stockholders; that the corporation is dominated and controlled by the Chase National Bank of the City of New York by reason of its ownership of a large block of the common stock of the company and that the control of Webster Eisenlohr, Inc., had been "usurped" by reason of the action of the company in refusing to recognize the officers elected by the preferred stock; that the alleged usurpation "is in fraud of the rights and privileges of the preferred stockholders and has had the effect of illegally depriving . . . [them] of their right to name directors"; and that the assets and property of Webster Eisenlohr, Inc., are being managed, controlled, financed and otherwise dis-

posed of for the sole benefit of the holders of the common stock to the "irreparable injury and prejudice of the preferred stockholders, notwithstanding the financial ability of the defendant company to pay or secure the rights and privileges . . ." of the preferred stockholders.

Speese prayed that the court adjudge that the preferred stockholders possess presently the exclusive voting power in the company, that a receiver pendente lite be appointed, and that general relief be granted.

Webster Eisenlohr, Inc., filed an answer denying the substance of the allegations of the complaint and set out two affirmative defenses which need not be stated here.

Between hearings upon the matter before the District Court the company sent to its stockholders copies of its annual report for the year 1942. Following the sending of the report the company also wrote its preferred stockholders, offering to purchase their interests. Copies of these documents were supplied to the District Judge upon his request although not introduced in evidence in the litigation. At one of the hearings Judge Kalodner indicated his belief that the financial statement sent by the corporation to stockholders was misleading and he criticized the letter sent to preferred stockholders for failure to state facts which he deemed material. Then, at a hearing on April 24, 1943, counsel for Speese stated to the court that he had no client since the shares of Speese and other stockholders which he had represented had been purchased. Judge Kalodner again expressed his dissatisfaction with the actions of the company and stated: "I will advise you gentlemen that I am going to appoint an examiner to look into this matter." Subsequently the court did appoint Mr. Bortin as Special Master under Rule 53 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c. The Special Master was directed "to investigate: the acts, conduct, property, liabilities, financial condition, books, records and assets . . . [of Webster Eisenlohr, Inc.]; all the circumstances relating to an Offer made March 26, 1943 to the Holders of 7% Cumulative Preferred Stock . . .; the arrangement made by and between . . . [Webster Eisenlohr, Inc.] with White, Weld & Co. of New York and Bertram K. Wolfe, Esq. with reference to the Offer made to the Preferred Stockholders; the conduct of the Board of Directors . . . with reference to the making of said Offer to the Preferred Stockholders; the propriety, reasonableness and adequacy of the said offer to the Preferred Stockholders; the question as to whether or not there was any violation of Rule X-10B-5 'Employment of Manipulative and Deceptive Devices' of the Securities and Exchange Commission, and any

other matters which may be referred to the Special Master by the Court as relevant to these proceedings.”

Counsel for Webster Eisenlohr, Inc., sought vacation of the order in the District Court and, failing that, asks a writ of mandamus directing the District Court to vacate this appointment and a writ of prohibition directed to the Special Master to prevent him from carrying out his commission. A majority of the court believe the company's position to be well taken.

The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative nor investigative. A judgment may only be properly given for something raised in the course of a litigation between the parties.² Now, what was the litigation in this case? The complaint presents the question of the legal effect of the provision that preferred stockholders, under given circumstances, shall have full voting power. Whether full voting power means that they may vote along with holders of shares of the common stock or whether “full” as used in the certificate of incorporation means “exclusive” is a question of interpretation of language to be made with such help as the Pennsylvania decisions give, since the corporate litigant is a Pennsylvania corporation. The allegations of fraud made in the complaint are conclusions from the plaintiff's claim that he and other preferred stockholders were entitled to exclusive voting rights and did not get them. This interpretation is corroborated by a letter sent by counsel for Speese “To the Remaining Preferred Stockholders . . .” of the company giving information concerning the institution of the Speese suit. The letter said “The gist of the suit was to settle, if possible, the long standing controversy between the preferred stockholders and the company as to whether or not the preferred stockholders should have the exclusive voting power in the company in view of the default in the payment of dividends, as distinguished from the right to vote together with the common stockholders.”

If the plaintiff's contentions on voting rights are upheld as a matter of law, the preferred stockholders are entitled to determine who shall manage the corporation, and other questions which may be determined by stockholders. They are entitled to court help to get those rights if they need it. On the

² Reynolds v. Stockton, 1891, 140 U.S. 254, 266, 270-271, 11 S. Ct. 773, 35 L. Ed. 464; Osage Oil & Refining Co. v. Continental Oil Co., 10 Cir., 1929, 34 F.2d 585; Georgia S. & F. Ry. Co. v. Einstein, 5 Cir., 1914, 218 F. 55, certiorari denied 1915, 239 U. S. 643, 36 S. Ct. 164, 60 L. Ed. 483; J. P. Jorgenson Co. v. Rapp, 9 Cir., 1907, 157 F. 732; Bradley v. Converse, 1876, Fed. Cas. No. 1,775, 4 Cliff. 366; Munday v. Vail, 1871, 34 N.J.L. 418. [Footnote by the court. See also Pope v. United States, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3 (1944); Bowles v. Baer, 142 F.2d 787 (C.C.A. 7th 1944).]

other hand, if the plaintiff's contentions as to the meaning of the phrase are incorrect, they have alleged no legal grounds for complaint. While a receiver was asked for, it was simply in connection with the relief to be given the plaintiff, based on the correctness of this theory of his voting rights. No one disputed the solvency of the corporation.

The directions given the Master went far beyond anything involved in the issues presented in the litigation, as will be seen from the reading of the order appointing him.

Masters are provided for in the Rules of Civil Procedure, Rule 53. This rule does not, in so many words, place any limitation on the scope of a master's commission. Nor has that question, apparently, been the subject of a great deal of litigation. There are general statements supporting the view that an order of reference cannot be more extensive than the allegations and proofs of the parties and there is some judicial authority to this effect. No authority has been found the other way.

On principle, however, the matter seems clear. Rule 53 is explicit in its statement that "A reference to a master shall be the exception and not the rule" and that in actions to be tried without a jury "a reference shall be made only upon a showing that some exceptional condition requires it." It is clear, we think, that a master is appointed only to help the court in a case where the help is needed. His appointment and activities are only for the purpose of assisting the court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before the court. The master operates as an arm of the court. Surely he has no wider scope of activity than the court itself. If the court is limited in its judicial duties, to deciding the issues presented in the litigation before it, the master's function can go no further than to aid in the court's discharge of its duties.

In this case the report made by the company to its stockholders and the circumstances under which some of the preferred stockholders disposed of their interests were not before the court in the then pending law suit. The District Judge felt that there were indications that the company had not been entirely aboveboard in the matter. The company, through its counsel, earnestly contended that it had been entirely fair. This court refused to hear counsel on that point, for we thought the matter not relevant. None of these stockholders was under guardianship; all had the full legal power to sell their shares under such circumstances as it pleased them to sell. If any one felt that he had been deceived, he could take the steps necessary to protect his rights. There was no indication that any party to the transaction was complaining. We think that neither the report to the stockholders

nor the sale of their stock was involved in the litigation. It was therefore outside the scope of investigation both by the Special Master and the court itself.

We do not think this view imposes unduly restrictive limitations upon courts. The judicial power is limited to deciding controversies. That has been its function historically; that is its function under the Constitution of the United States. No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers of bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function in limiting themselves to the controversies presented by parties in litigation.

. . .

In view of the above discussion we think it unlikely that the formal issuing of the writs prayed for will be necessary. The applicant may later apply to this court if the need presents itself. No order for costs will be made.³

NOTES

(1) *Wilbridge v. Case*, 2 Ind. 36 (1850): "This was a petition under the statute for partition. . . . There was no plea filed, but the parties appeared and submitted the cause to the Court for trial upon an agreed state of facts." Judgment for defendant *reversed*. "[A] trial without an issue is erroneous, . . . Without an issue, nothing is tried, and, of course, nothing determined, and a judgment in such a case should bind neither party. Bouvier calls such a trial a mistrial. (Law Dic. Vol. 2, 3d ed. p. 155) . . . According to Blackstone, such an error would be ground for an arrest of judgment. [Book 3d, p. 394] . . ."

(2) *Ford v. Inhabitants of Town of Whitefield*, 137 Me. 125, 126, 15 A. 2d 857 (1940): This was an action, tried by a referee, brought for the breach of an express contract to build a road in the Town of Whitefield. According to the terms of the contract as set forth in the declaration, plaintiff agreed to furnish cer-

³ Dissenting opinion of Biggs, C.J., omitted. Petition for writ of certiorari denied. 325 U.S. 867, 65 S. Ct. 1404, 89 L. Ed. 1986. Cf. Arnold, *Trial by Combat and the New Deal*, 47 Harv. L. Rev. 913 (1934), a very provocative essay which is extremely critical of the notion that "only the particular and narrow issues brought before courts by contesting parties may be the basis of judge-made law." The author says (p. 920, n. 10) that "entire philosophies of the nature of proof have been based on the notion that a trial is and necessarily should be a contest over issues formulated in advance," and in that connection cites Michael and Adler, *The Nature of Judicial Proof* (1931). As one of the authors of that book, the editor of this book can confidently say that Professor Arnold misread it. The philosophy of proof which it expounds is based only on the notion that one cannot answer a question until he knows what the question is, or prove a proposition until he knows what proposition it is that he is trying to prove.

tain gravel and defendant agreed to build the road. The declaration alleged that the gravel was furnished but that defendant did not build the road. Exceptions to the referee's report in favor of plaintiff *sustained*. "It is apparent that the evidence does not warrant a finding for the plaintiff on an express contract. Plaintiff, however, calls attention to the following stipulation of counsel: 'It is further stipulated that under the pleadings the question of whether or not plaintiff is entitled to recover either on an express or an implied contract may be determined.' It is unnecessary to decide whether the evidence would have been sufficient had the declaration been amended, for no amendment was offered. . . . Orderly procedure requires that the pleadings should set out the cause of action and define the issue. The parties cannot by agreement confer jurisdiction on the referee to determine any matter which may arise between them."

"This very case is an illustration of the confusion which is likely to result if we accept as proper the anomalous procedure which these parties sought to adopt. The referee to use his own language construed the stipulation to mean that 'regardless of the pleadings, the referee was to pass upon the merits of the case and make such findings as the facts warranted.' This is no more nor less than saying that he could make findings without any pleadings at all; and it is significant that the findings in this case do not disclose what was the basis for the judgment to be rendered or even whether it was to be founded on contract or on tort."⁴

⁴ Cf. *Havens v. Irvine*, 61 Wyo. 309, 157 P.2d 570 (1945): Action for a commission by a real estate broker, in which defendant appealed from a judgment for plaintiff on the ground that the evidence disclosed that plaintiff's agency was terminated prior to the sale. "It is suggested that defendant did not plead a revocation of the listing but relied on a general denial of plaintiff's allegations of a cause of action. However, it is to be noted that both plaintiff and defendant introduced testimony and evidence of this revocation without any objection or exception on the part of either and it was a conceded fact in the case. The consequence of this situation has been pointed out by this court in *Cloughton v. Johnson*, 47 Wyo. 536, 41 P.2d 527, thus: Quoting from 49 C.J. 868 and 876, it is said:

"'Admission of evidence without objection may aid and enlarge the pleadings, cure defects, or supply omissions thereon, and render it proper for the trial court to treat the pleadings as amended so as to conform to the proof.' . . .

"Moreover, it seems quite clear that plaintiff by introducing evidence on the point waived his right to object to this line of proof as without the pleadings. 4 C.J. 793-4 and cases cited. See also 5 C.J.S., Appeal and Error, § 1580. Regarding the right to prove revocation of authority of a broker under a general denial, authority may be found both upholding the right (*Mott v. Minor*, 11 Cal. App. 774, 106 P. 244) and disallowing it (*Mausser v. Hurdle*, 27 Colo. App. 567, 140 P. 479; *Bradley v. Blandin*, 91 Vt. 472, 100 A. 920). In the *Mausser* case there would appear to have been no evidence of revocation in the record.

"Additionally, in this connection it may be observed that plaintiff's petition alleges that 'while the employment was in full force and effect plaintiff procured a purchaser, * * * who did purchase the property,' etc. It is difficult to perceive why under a denial of that allegation by the defendant the latter was not entitled to prove as decisive of one of the issues in the case a revocation of the listing, thus establishing that the plaintiff's 'employment' was *not* in full force and effect at the time the sale was made. This proof was, it would seem, both competent and material to a proper decision of the lawsuit."

B. The Creation of a Burden of Proof

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

1934. 34 Col. L. Rev. 1224, 1258-1259, 1256-1258.

It is an ancient principle of rhetoric that the disputant who affirms a proposition has the burden of proving it, and that his opponent can succeed in the dispute even though he offer no argument if the person having the burden fails to carry it. The rules of procedure, in large part, regulate a trial in the light of this principle. It is generally the case that the party who must allege a material proposition has the burden of proving it, whether he be the plaintiff or the defendant.¹

The rules of law governing what is known as the quantum of proof must be considered in this connection. To use the traditional language, in some cases the material propositions must be proved beyond a reasonable doubt, in others by a preponderance of the evidence; the task of persuasion is, of course, strictly correlated with the degree of proof required.² But what is meant by "quantum of proof" or "degree of proof"? The most satisfactory answer to this question is given in terms of the degrees of probability which ultimate probanda can be proved to possess.³ An ultimate probandum is proved beyond a reasonable doubt if it is proved not only to be more probable than its contradictory but to be much more probable than its contradictory; it is proved by a preponderance of the evidence if it is proved to be more probable than its contradictory by any amount. In the absence of a fuller analysis of the theory of probability, it is impossible to make a more accurate interpretation of these different quanta in terms of probability values, but such interpretation can be made.

¹ There are, of course, important exceptions to this convention; in some cases the party traversing the proposition has the burden usually on the ground that the burden is thus more fairly and expediently disposed.

² In still other cases it is said that the proof of the material propositions must be clear and convincing, or some other quantum of proof is prescribed which like "clear and convincing proof" is supposed to fall somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt. We shall ignore these requirements, first, because they are not of general application and, second, because for reasons which cannot be given here it is impossible for us, as it has been for the judges, to say more precisely what they mean.

³ If it were supposed that the ultimate probanda could be proved to be true, a degree or quantum of proof would have to mean that a proposition could be proved to be true either beyond reasonable doubt or true by a preponderance. But there are no degrees of truth. "True beyond reasonable doubt" would have to be understood as "highly probable" in the sense of "much more probable than its contradictory" and "true by preponderance" would have to be understood as "slightly probable" in the sense of "slightly more probable than its contradictory." The distinction between different "quanta of proof" thus seems to be a clear recognition that the ultimate probanda in judicial proof are proved to be more or less probable and not to be true or false.

The rules of procedure not only determine the degrees of probability to which ultimate probanda must be proved, but also distribute between the parties the burden of proving them. Controversy cannot be well regulated unless a burden of proof is clearly placed upon one or the other of the disputants with respect to each proposition involved in the dispute. If in any litigation there are two or more ultimate probanda, the plaintiff may have the burden with regard to some of them and the defendant with regard to others. Let us suppose a case in which (1) the plaintiff alleges and the defendant traverses the material propositions P and Q and (2) the defendant alleges and the plaintiff traverses the proposition R which is material as an affirmative defense. Normally, although not invariably, the plaintiff will have the burden of proving P and Q and the defendant will have the burden of proving R. Since conjunctions of propositions cannot be proved, but only single propositions, the burden of proof must always be viewed with respect to single propositions. Thus, in the case supposed, the plaintiff has two burdens of proof whereas the defendant has only one. Normally, although not invariably, neither will have any burden of disproof, that is, neither will have the burden of proving the contradictory of any proposition with regard to which the other has the burden of proof, although he will have the right to do so.

The burden of proof carries with it certain responsibilities. In the first place, since there is normally no burden of disproof and since a burden of disproof never occurs except as the result of proof, the proof of a proposition must always precede its disproof. That means that the party having the burden of proving a particular proposition must initiate the process of proving that proposition.⁴ The order of procedure in proving and disproving particular propositions is thus determined by the incidence of the burden of proving those propositions, with this important qualification: that the plaintiff is required to prove all propositions with respect to which he has the burden of proof before the defendant need undertake the proof of those which he has the burden of proving. Thus, in the case supposed, the proof of P and Q by the plaintiff would precede not only the disproof of P and Q but also the proof of R by the defendant. The defendant's burden of proof, therefore, differs from the plaintiff's in the sense that the former is conditioned upon the execution of the latter. While if R is put to proof, the defendant will have the burden of proving it, it will not be put to proof unless and until the plaintiff proves

⁴ It is traditionally said that he has the burden of coming forward with evidence, but since evidence is employed in proof, to say that a party has the burden of coming forward with evidence at any stage of the trial is to say that he then has the burden either of proving or of disproving some proposition.

P and Q, and it may be that it will not then be put to proof. It may be that the defendant will abandon his affirmative defense and rely entirely upon his negative defenses. In short, while the plaintiff cannot achieve the legal action which he desires unless he sustains his burden of proof, the defendant may be able to avoid such action without sustaining his burden.

In the next place, the burden of proving a proposition is the burden of proving it either by a preponderance of the evidence or beyond a reasonable doubt, according as the case is a civil or a criminal case. That is to say that a party cannot sustain his burden of proving a particular proposition by proving it to be probable to *some* degree but only by proving it to be probable to the required degree, whatever that may be. Finally, the burden of proving a proposition usually, if not always, carries with it the burden of persuading the judge that the jury can reasonably find, and of persuading the jury to find, that the proposition has been proved to possess the required degree of probability. Usually, if not always, the burden of persuasion accompanies the burden of proof. In the course of a trial, new burdens arise. For example, although in the case which we have put the defendant was at the beginning of the trial under no burden of disproving P or Q, he may during the course of the trial incur the burden of proving not-P or not-Q.⁵ Normally, the defendant's burden of disproving P, that is, of proving not-P, will differ from the plaintiff's burden of proving P in two important respects: (1) It can almost always be satisfied by a quantum of proof which is less than that required to sustain the burden of proof, and (2) while it is accompanied by a burden of persuading the judge, it is almost never accompanied by a burden of persuading the jury, that disproof has been accomplished to the required quantum of proof. We cannot discuss these matters further here, except to add that the burden of disproof usually suspends but does not terminate the burden of proof, that it is at an end when the judge is persuaded that it has been sustained, and that it rarely dislocates the burden of persuading the jury regarding the final result of proof and disproof.

⁵ This may occur as the result of the plaintiff's having proved P or Q to be so highly probable that in the opinion of the judge the jury could not reasonably find that P or Q had not been proved to possess the required degree of probability. Traditionally, it is said that the effect of such proof is to shift the burden of coming forward with evidence, but again we point out that evidence is employed in proof so that the burden of producing evidence is necessarily a burden of proof. Moreover, to speak of the shifting of the burden of coming forward with evidence is misleading since it suggests that it is the same burden which rests at one time upon the plaintiff and at another upon the defendant, whereas there are two quite different burdens, a burden of proof which has existed from the beginning of the trial and a burden of disproof which has arisen during the course of the trial.

RINGSTAD v. GRANNIS

Circuit Court of Appeals of the United States, Ninth Circuit, 1947.
159 F.2d 289.

DENMAN, CIRCUIT JUDGE. The complaint in this case is in ejectment. The issue was joined, the case proceeded to trial and at the close of the plaintiff's case the court entered a judgment of nonsuit. Plaintiff appeals.

The complaint alleged that plaintiff "and her predecessor have been in the peaceable, adverse, open, notorious possession of the . . . property (described below) under color of title for more than thirty (30) years last past." It also alleged defendants' trespass in entering the property and tearing down a fence thereon and forcibly restraining possession thereof.

. . . .
The answer denied the allegations of the complaint . . .
. . . . [T]he only question before the district court was whether the plaintiff had a continuous possession of the property prior to the claimed trespass of the defendants. . . .

Plaintiff offered evidence tending to show her long continued possession of and her eviction by the defendants from the property described, but the district court declined to admit it over the objection that it was "incompetent, irrelevant, and immaterial, no foundation laid, and not within the issues of the case." After several attempts to introduce the evidence had failed, counsel for plaintiff asked the court to state the reason for its denials, remarking that it would be of assistance both to his litigant and to the appellate court. The district court refused to comply after several refusals to admit evidence we regard within the issues, with the unfortunate statement in the following colloquy:

"Mr. Bell: You will not state why you are taking the position you are in this case?"

"The Court: I have stated every time I have ruled. Exception allowed plaintiff.

"Mr. Bell: You know it is my theory, judge, that a trial of a lawsuit is not a game; that it is just a promotion of justice between the parties; and, if there is some technicality that counsel has overlooked, it would be at least in promotion of justice for the court to tell me if I have overlooked something so that the case can be determined correctly.

"The Court: I don't think it is the duty of the court to conduct a law school.

"Mr. Bell: That is what your position is? I hope that is in the record. Exception allowed plaintiff."

Another denial was with the equally unfortunate statement, "Mr. Bell: Would the court please state what part—on what theory he sustains the objection, on what theory; that there is no foundation laid?

"The Court: You are supposed to be an attorney-at-law and know and understand this.

"Mr. Bell: Yes, but there is a Circuit Court of Appeals that might want to know.

"The Court: That is very nice. I hope they do."

We agree with counsel's statement that this court wants to know the ground of these rulings in such an action in ejectment. We are unable to determine it from the record. We may guess that it was because it was thought that in Alaska possession is not a legal estate which could be the foundation to be laid in an ejectment suit.

We also agree with appellant that "a lawsuit is not a game" between opposing counsel. Cf. *Escher v. Harrison Securities Co.*, 9 Cir., 79 F. 2d 777, 780, 781. It is a proceeding in which the court seeks to do justice between opposing *litigants*. It is the litigant who is to be assisted in the search for justice by a clear understanding of the ground for the court's rulings where the litigant's attorney requests it.

We think it error to have denied the introduction of the proffered evidence. The judgment is

Reversed.

LUPTON v. DAY

Supreme Court of North Carolina, 1937. 211 N.C. 443, 190 S.E. 722.

This was an action for wrongful and malicious injury to plaintiff's boat by removing same from its moorings and causing it to sink.

Upon issues submitted, the jury returned verdict that the defendants J. J. Day and his wife, Adelaide Day, were liable for the injury to the boat, and awarded the plaintiff both compensatory and punitive damages. The other named defendants were eliminated from the case during the trial.

From judgment on the verdict, defendants J. J. Day and Adelaide Day appealed.

DEVIN, J. The appellants assign as error the ruling of the court below in permitting, over their objection, the introduction in evidence by the plaintiff of paragraph 8 of his complaint.

Paragraph 8 of the complaint is as follows: "That the defendants, jointly and severally, acting one with another, willfully,

maliciously, and unlawfully, without the knowledge or consent, and in violation of the plaintiff's desires and rights, on or about 6 February, 1936, pulled said boat away from its moorings and towed it between one-half and one mile in the deep water up Smith's Creek, a tributary of Neuse River, which said creek at the point said boat was carried is salt water, and there caused and permitted the boat to sink."

To this paragraph of the complaint the defendants answered as follows: "The defendants, answering the 8th paragraph of the complaint, deny that they jointly or severally acted one with another, willfully, maliciously, and unlawfully, without the knowledge or consent and in violation of the plaintiff's rights, or did anything whatsoever to injure or damage said boat. Further answering said 8th paragraph of the complaint, these defendants say that the said J. J. Day, acting in good faith on this information received from Captain Whitford, requested the defendants Elbridge Daniels and Wilbur Hudnell and Mack Lewis and Dawson Delemar to aid and assist him in moving the said 'Mildred B' from its position, which partly blocked the ingress and egress of the Day dock. Further answering said 8th paragraph of the complaint, these defendants say that the defendant Adelaide Day took no part nor did she in any way advise with or encourage the moving of said boat, and that the said Adelaide Day had no knowledge that said boat was being moved."

The plaintiff was properly permitted to offer in evidence the admission in the answer that defendant J. J. Day requested certain of the defendants (other than Adelaide Day) to assist him in moving the boat. This was competent, certainly against J. J. Day. But the introduction of a paragraph of the complaint which was denied in the answer violated the rule against permitting one to make evidence for himself by the production of self-serving declarations. Lockhart on Ev., par. 159, 1 A. L. R., 42, *et seq.* (note).

The denial in the answer of the fact alleged in the complaint puts the controverted fact in issue, and neither is the denial evidence against nor the plaintiff's allegation evidence for the truth of the disputed fact to be determined by the jury. *Jackson v. Love*, 82 N. C. 405.

It has been uniformly held by this Court that a party may offer in evidence a portion of his adversary's pleading containing the admission of a distinct and separate fact, relevant to the inquiry, without being required to introduce accompanying qualifying or explanatory matter. *Sears, Roebuck & Co. v. Rouse Banking Co.*, 191 N. C. 500, 132 S. E. 468, and cases there cited.

And when the answer contains a categorical admission of an allegation, the same rule permits the introduction of the allegation in the complaint for the purpose of showing what was admitted; and further, when the answer contains a qualified admission, that portion of the corresponding allegation of the complaint which tends to explain the relevancy of the admission may become competent. *Lewis v. R. R.*, 132 N. C. 382, 43 S. E. 919; *Modlin v. Ins. Co.*, 151 N. C. 35, 65 S. E. 605.

But this wholesome rule does not go to the extent of permitting the plaintiff to introduce as competent evidence his own allegation of a material fact which is denied in the answer.

In the instant case the defendant J. J. Day admitted in the answer and testified on the trial that he authorized the removal of the boat, and based his defense on his right to move it and the absence of consequent injury to the plaintiff. These questions were determined against him by the jury, and hence the introduction in evidence of the paragraph of the complaint was, as to him, immaterial and harmless, and the assignment of error therefor, on his part, cannot be sustained.

But in the case of defendant Adelaide Day, there was neither admission in the answer nor testimony on the trial that she performed any act in respect to moving the boat, or was present at the time, or counseled or procured its removal. So that the introduction in evidence of the material allegation that "the defendants (including Adelaide Day) jointly and severally, acting one with another, willfully, maliciously, and unlawfully and in violation of the rights of the plaintiff" moved said boat and caused it to sink, constituted prejudicial error, for which she is entitled to a new trial.

For the reasons stated, we conclude that there was in the trial, as to defendant J. J. Day, no error; and that as to defendant Adelaide Day there must be a new trial upon the issue as to her liability for the alleged injury to plaintiff's boat.

Partial new trial.¹

NOTE

Patrick v. Holliday, 200 Ga. 259, 36 S. E. 2d 769 (1946): Defendant appealed from a judgment for plaintiff in an action for specific performance. The question was whether or not the evidence supported the allegations of plaintiff's petition that in consideration of services to be rendered to defendant's intestate by plaintiff, he promised orally to devise certain land, described in the petition, to her. She contended that "any defect in making out a prima facie case as to the description of the realty involved

¹ Cf. *United Air Services v. Sampson*, 30 Cal. App. 2d 135, 86 P.2d 366 (1939).

was cured" by the following testimony of her husband: "Q. Have you read the petition over? A. Yes, sir. Q. State whether or not the allegations of fact therein are true? A. It is true." *Reversed*. "A party's pleadings are not ordinarily evidence in his favor. . . . The pleadings merely present the issues, and, where denied by the opposing party, must be established by aliunde proof. It would be revolutionary to our system of jurisprudence to permit a plaintiff to establish the allegations of the petition and make out a prima facie case by merely testifying that the contents of the petition are true. The effect of such a ruling would prevent nonsuits, demand directed verdicts, eliminate new trials on grounds of the insufficiency of evidence, and create many other drastic and abhorrent innovations affecting the law of *allegata* and *probata*. Many other reasons may be assigned for declining to give any credit to such testimony, but suffice it to say that in a suit of this nature such evidence has no probative value."

HASSETT v. CURTIS

Supreme Court of Nebraska, 1886. 20 Neb. 162, 29 N.W. 295.

REESE, J. This was an action to foreclose a mechanic's lien. The decree in the district court was in favor of plaintiff, and defendant, D. S. Curtis, appeals.

Appellant insists that the petition does not state a cause of action against defendant and the property sought to be affected, but as the abstract furnishes no information as to the allegations of this pleading we cannot decide as to its merits.

The next contention is, that the evidence adduced on the trial was not sufficient to sustain the finding of the court, and that no cause of action was proved on the trial.

As the testimony adduced on the trial was very short we copy the same in full. It is as follows:

Plaintiff in his own behalf testified:

Q. 1. Are you the plaintiff in this case?

A. I am.

Q. 2. Will you look at that account (handing witness a paper) and see if that account is due and remains unpaid?

A. Yes, the balance here has never been paid.

Q. 3. Also as to the affidavit attached to the account, Is that the original affidavit you filed in the county clerk's office and obtained a lien?

A. Yes, the same as I signed.

Q. 4. Has any part of that account been paid, except as endorsed on the account?

A. That is all that has been paid.

Plaintiff offers in evidence the account attached to the pleadings.

Q. 5. How much is due upon this account?

A. \$36.46. That is after \$74.80 has been paid. The balance due is \$36.46 and interest.

Q. 6. When was that due? When was that \$36.46 due?

A. It was due at that time.

Q. 7. Now the date?

A. The day it was put on.

Q. 8. Was it a cash item?

A. That \$74 was a cash item.

Q. 9. Was the bill due when the material was furnished?

A. Yes, he agreed to pay it within sixty days' time. I sold the material and he did not do it.

CROSS-EXAMINATION.

Q. 10. These articles were furnished at the time set out in this bill.

A. Yes, it is all the same bill.

Q. 11. To whom did you furnish this material, and who owes you for the same?

A. Mr. D. S. Curtis.

This testimony, uncontradicted as it is, is sufficient to sustain the finding of indebtedness, and would support a judgment for money only. But we fail to find any proof which would justify a finding that the lumber was furnished by virtue of a contract, express or implied, for the construction or reparation of any building or other improvement on the land of appellant, or that the material was used by him for any such purpose.¹

We are informed by the abstract that the answer contained a general denial of the allegations of the petition. This requires proof upon every material allegation therein not admitted of record to be true. Maxwell's Pleading and Practice, 127. *Donovan v. Fowler*, 17 Neb., 247, 22 N. W. 424.² . . .

¹ Neb. Rev. Stat. § 52-101 (1943) provides: "Any person who shall perform any labor or furnish any material . . . for the construction, erection, improvement, repair or removal of any house . . . or building or appurtenance by virtue of a contract or agreement, express or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, . . . building or appurtenance, and the lot of land upon which the same shall stand." The Statute was enacted in 1885. See Laws 1885, c. 62, § 1, p. 275.

² Cf. *The Lafayette and Indianapolis Railroad Co. v. Ehman*, 30 Ind. 83, 86

The decree of the district court will therefore be set aside, and the cause remanded to that court, with directions to re-try the cause if plaintiff so desires; or in case he should so elect, to render judgment in his favor for the amount found due on the previous trial.

Reversed and Remanded.

NOTE

Hickey v. Breen, 40 Mont. 368, 106 P. 881 (1910): Action of claim and delivery in which plaintiff alleged and defendant denied that on a certain date "defendant wrongfully, and without consent of the plaintiffs, took said bay mare from the possession of the plaintiffs, and ever since has so wrongfully held possession of the same." The jury returned the following verdict: "We, the jury . . . , find our verdict in this action that the plaintiffs . . . were, at the time of the commencement of this action, and are now, the owners of, and entitled to the immediate possession of the bay mare described in the plaintiffs' complaint, and are entitled to the possession and return of said bay mare or the sum of \$200, the value of said mare, in case a return thereof cannot be had." Judgment for plaintiffs *reversed*. The verdict was a special verdict.³ "There is not any finding at all upon the very material issues whether the defendant ever took the property from the plaintiffs, or detained the same." The verdict was therefore insufficient to support the judgment. "A verdict which finds but part of the issues, and says nothing as to the rest, is insufficient, because the jury have not tried the whole issue."

CELLA v. ROTH

Court of Errors and Appeals of New Jersey, 1934. 113 N.J.L. 458, 174 A. 703.

WELLS, J. This is an appeal from a judgment entered in the Supreme Court in a negligence case on a verdict of a jury in favor of the plaintiff. The suit was instituted against George Roth and Vincenzo Matassa to recover damages for injuries sustained July 27th, 1932, by the infant plaintiff, Joseph Cella, a boy twelve years of age (hereinafter spoken of as plaintiff). . . .

There was considerable difference between the version of the accident as given by the plaintiff and the version given by the defendant.

Both plaintiff and defendant, however, agree that the plaintiff was struck by an automobile owned and operated by Vincenzo Matassa which at the time of the accident was proceeding in a

(1868): "The answer was a general denial, which threw on the plaintiff the burden of proving every material allegation of the complaint."

³ For the difference between a general and a special verdict and a discussion of their respective advantages and disadvantages, see *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54 (C.C.A.2d 1948).

southerly direction on the Hudson county boulevard in North Bergen township (hereinafter spoken of as boulevard).

The original complaint alleged that the plaintiff at the time of the accident was crossing the boulevard from west to east on the southerly crosswalk and that he was struck in the center of the boulevard. This was also defendant's contention. The allegation was that the accident was caused by the joint negligence of Roth and Matassa.

At the trial Matassa not appearing, the plaintiff's attorney moved to amend the complaint to allege that the plaintiff was crossing Hoboken street from south to north instead of crossing the boulevard from west to east.

The plaintiff's testimony tended to show that the defendant Roth was operating his automobile in an easterly direction up a steep incline on Hoboken street and that the plaintiff was crossing, on a green traffic light, Hoboken street from the south to the north side thereof, at the westerly side of the Hudson boulevard; that the defendant Roth disregarding a red traffic light against him on Hoboken street, drove his automobile toward the plaintiff at a fast rate of speed, compelling the plaintiff to run out into the boulevard to avoid being struck by Roth's car and causing plaintiff to be struck by the automobile of Matassa coming south on the boulevard.

The answer denied the material allegations of the complaint and set up two separate and distinct defenses; the first that the plaintiff was guilty of contributory negligence and the second, that "the alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible."

The defendant's version of the accident was that he came up Hoboken street toward the boulevard in second gear at about fifteen to twenty miles per hour; the traffic light was red against him and he came to a "dead stop," even with the sidewalk, on Hoboken street. He remained there a couple of minutes awaiting the traffic signal to change; that he didn't enter the Hoboken street crosswalk or go out on the boulevard until the traffic light changed to green; that the plaintiff was at no time on the Hoboken street crossing nor in front of defendant's car, but the crossing was absolutely clear; that during this two minute stop the accident occurred out on the boulevard.

He said that he saw a Ford car (the Matassa car) coming south in the middle of the boulevard and that this car hit the plaintiff, and stopped after it passed the curb line about twenty-five feet; that a fellow jumped right out of the car and picked up

the boy, who was lying across the southerly crosswalk (that is the one running west to east over the boulevard), about twelve to fifteen feet out from the westerly curb, and went right off with the boy. This all happened in less than a minute and while defendant was at a standstill on Hoboken street.

On cross-examination defendant said the first time he saw the plaintiff was when he was falling on the pavement.

In this state of the evidence and with the undisputed proofs showing that Matassa's car and not Roth's, had collided with the plaintiff, the court charged the jury that the burden of proof was upon the plaintiff to prove his case by the greater weight of the evidence and that it was necessary for them to find that the defendant Roth was negligent and that his negligence was the proximate cause of the injury to plaintiff; and that if it was through the negligence of Matassa and not through the negligence of Roth that the plaintiff was injured, Roth could not be held liable. After thus correctly charging the jury on the burden of proof, the court proceeded to discuss the separate defenses set up by the defendant and charged the jury as follows:

"There are two separate defenses as the court has mentioned, and in order for the defendant to be served with a verdict or receive a verdict according to those defenses, he is obliged to prove them by the greater weight of the evidence."

Then follows a reference to and explanation of contributory negligence, after which the court continued as follows:

"If you come to the conclusion by the greater weight of the evidence that it was the negligence of this third party referred to by the court as Matassa, that is, the operator of the automobile on the boulevard, going south, and you come to that conclusion, that it was his negligence that caused the boy's injury, you should not hold Roth."

After the court had concluded this main charge he asked counsel if there were any exceptions to the charge, whereupon Mr. Cox, counsel for the defendant, requested the court to charge that the defense that the accident was due to the negligence of a third party over whom defendant had no control was in the nature of an explanation rather than a separate defense. To this the court replied that it was a separate defense and asked counsel if he withdrew it and counsel said, "it is explanatory and I'll withdraw it." Whereupon the court said, "if you withdraw it that defense is out of the case."

Then occurred the following colloquy between the court and counsel for defendant:

Mr. Cox—"May I withdraw it with the stipulation that we still contend it was the fault of the other man?" The court—"You can't have the benefit of the defense and then withdraw it." Mr. Cox—"Then I will have to let it stand."

Thereupon the court, by way of supplement to his main charge said:

"You will understand, gentlemen of the jury, as the court has heretofore explained to you that if you find from the testimony in this case that the defendant in this case has proved to your satisfaction by the greater weight of the evidence any of the affirmative defenses alleged, that is to say the one of contributory negligence on the part of the boy, or the one that it was the fault of someone else, you may return a verdict in favor of the defendant."

The appellant's sole point for reversal is that there was prejudicial error in the judge's charge.

We agree with appellant in this.

In the three paragraphs hereinbefore cited, taken from the court's charge, the defendant was placed under the duty of carrying the burden of proof to show that the accident was caused by the negligence of some one other than himself.

We think this is unsound.

While the court also charged the jury that the burden was upon the plaintiff, these conflicting statements of the law, one correct and the other incorrect, required the jury to choose between them. "A jury is not required to determine what part of a contradictory charge is correct." *McLaughlin v. Damboldt*, 100 N. J. L. 127, 125 A. 314, 315. The trial court was evidently under the impression that the defendant, Roth, by setting up the negligence of the third party as a separate defense, had presented a new issue for the jury's consideration and that under the rules defendant had the burden of proving the same by the greater weight of the evidence. A matter of defense which is pleaded by way of special plea may be a defense of which the defendant could avail himself under the general issue.

We held in *Kresse v. Metropolitan Life Insurance Co.*, 111 N. J. L. 474, 168 A. 634, which was an action brought by the beneficiary on a life insurance policy in which the defendant insurance company set up death by suicide by way of separate defense, that it was error for the trial court to charge the jury that the burden of proving that the insured came to his death by suicide rested upon the defendant insurance company.¹

¹ One of the charges held to be erroneous in this case was as follows: "In discharging the burden of proving that the deceased came to his death by suicide

To the same effect is *Hughes v. Atlantic City, &c., Railway*, 85 N. J. L. 212; 89 A. 769, in which this court held that defendant's right to have plaintiff bear the burden of proof upon the whole case is a substantial right of which defendant should not be deprived.

The burden of proof never shifts from the one asserting a cause of action. If the plaintiff makes out a *prima facie* case and the defendant offers an explanation which leaves the jury in a state of equipoise on the question of negligence, the defendant is entitled to a verdict. He is never under a duty of showing by the weight of the evidence that he is innocent of negligent conduct. The defendant did not have to prove by the weight of the evidence that another was guilty but was entitled to be relieved of liability if he showed enough to make the jury feel that his negligence was not proved by the greater weight of the evidence. This matter was not really one of separate defense. It was sufficiently raised by the denial of defendant's own negligence. A separate defense which must be proved affirmatively is one which is good even if the allegations of the complaint be proven, such as contributory negligence and assumption of risk. Such defenses are no part of the primary question in the case. So in the instant case the special plea was merely a special plea of defense which amounted in effect to the general issue. Therefore, the filing of it did not change the burden of proof on the main issue, namely on the question of defendant's negligence.

Respondent, however, says that if there was error in the court's charge, this error was invited by the appellant in setting up his separate and distinct plea in his pleadings, and that, therefore, the judgment of the trial court should be affirmed. We are not in accord with the respondent in this. Neither are we in accord with the respondent's further contention that if there was any error in the court's charge, the error was not prejudicial. It is true that the court did in one part of his charge, correctly inform the jury as to the burden of proof which must be borne by the plaintiff in order for him to recover² but this correct state-

. . . , the defense cannot prevail through the mere proof of circumstances which render the conclusion of suicide probable if in the case there are other circumstances which render it equally probable that the death was not suicidal." Of this charge the court said (111 N.J.L. 478-479, 168 A. 636): "[T]hat statement put the burden on the defendants and manifestly the defendants below had no such burden. . . . An analysis of this instruction to the jury shows it to mean that if the proofs on the one side as against the other be coequal, there should be a finding for the plaintiff. Where the proofs presented by each side turn out to be equally persuasive on the issue in the case, it is the duty of the jury to find for the defendant."

² Cf. *Darrow v. Fleischer*, 117 Conn. 518, 520, 169 A. 197 (1933): "In an ordinary civil action the party upon whom rests the burden of proof has sustained it if the evidence, considered fairly and impartially, induces in the mind of the

ment of the law did not cure the error in the portion of the court's charge which the appellant challenges in this appeal, for the reason that it is impossible to tell whether the verdict of the jury might have been the result of the erroneous portion of the charge. *Nemecz v. Morrison and Sherman, Inc.*, 109 N.J.L. 517, 162 A. 622.

The trial court in the instant case was in nowise misled by the separate defense set up in the pleadings. This is clearly indicated by the colloquy between the court and counsel for defendant, hereinbefore referred to.

We are of the opinion, for the reasons herein stated, that the charge of the court was erroneous and harmful and that the judgment must, therefore, be reversed to the end that a *venire de novo* may issue.

WINANS v. ATTORNEY-GENERAL

House of Lords, 1904. [1904] A. C. 287.

WILLIAM LOUIS WINANS was born in the United States in 1823. In 1859 he came to England and lived there in various places until his death in 1897. By his will he bequeathed an annuity to a relative, and the question in this appeal was whether he was at his death domiciled in England. If he was, legacy duty was payable; otherwise not. The Attorney-General having filed an information against the appellants (who were the executors) to recover the duty, Kennedy and Phillimore JJ. held that the testator was at his decease domiciled in England and that the duty was payable. This decision was affirmed by the Court of Appeal (Collins M. R., Stirling and Mathew L. JJ.) Hence this appeal. The arguments turned entirely on the true inference of fact to be drawn from the evidence, which is fully stated in Lord Macnaghten's judgment.

May 10. EARL OF HALSBURY L. C. My Lords, the short question here is whether Mr. Winans was at the time of his death domiciled in this country. So far as it is a question of law it is simple enough to state, but when the law has been stated a difficult and complex question of fact arises, which it is almost always very hard to solve.

Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined

trier a reasonable belief that it is more probable than otherwise that the fact in issue is true."

purpose to make the place of his new domicile his permanent home. Although many varieties of expression have been used, I believe the idea of domicile may be quite adequately expressed by the phrase—Was the place intended to be the permanent home? Now Mr. Winans was an American citizen; he resided in Russia for some time; he had various residences in England, and great sporting leases in Scotland. He married in St. Petersburg a Guernsey lady. He had property in the United States, and he originally came to England upon the recommendation of his medical man. He lived a very long time in England, and if I were satisfied that he intended to make England his permanent home I do not think it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous. It would be enough that for obvious reasons he had determined to make England his permanent home. But was that his determination? I confess I am not able very confidently to answer that question either way. I have been in considerable doubt, when I view his whole career, whether he ever intended finally to remain here. He had invented cigar-shaped boats, in which he took a deep interest as inventor, and also as one who meant to travel back to his own country when his boats succeeded.

It may be that your Lordships do not think that he was likely to succeed, but it may confidently be asserted that the inventor thoroughly believed that he would succeed. It is true that great reliance might not only be placed upon his great acquisition of sporting areas in Scotland, but, on the other hand, they were treated by him rather as profit-making investments than because he himself was devoted to sport; but even in this, as in some other parts of his conduct, it is difficult to say that a certain inference could be deduced from what he did. Being a man of enormous wealth, he never made such a home for himself or his family as one would have expected if he had really meant to remain permanently in England. Like all questions of fact dependent upon a variety of smaller facts, it is possible to treat this or that evidence as conclusive, and different minds will attribute different degrees of importance to the same facts.

I must admit that I have regarded the whole history of Mr. Winans' life differently at different stages of the argument, and the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown, and, as I cannot bring myself to a conclusion, either way, whether Mr.

Winans did or did not intend to change his domicil, his domicil of origin must remain, and I, therefore, am of opinion that the judgment of the Court of Appeal ought to be reversed.

LORD MACNAGHTEN. . . . My Lords, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—"a determination"—"a final and deliberate intention"—to abandon his American domicil and settle in England? . . .

On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by Wickens V.-C., "if the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt Mr. Winans, who was, as his son says, "entirely American in all his ideas and sympathies," would have answered it in favour of America.

I am therefore of opinion that the Crown has not discharged the onus cast upon it, and I think that the order appealed from ought to be reversed.

LORD LINDLEY. . . . My Lords, I do not propose to refer at length to the details of Mr. Winans' life. They were elaborately brought to your Lordships' attention by counsel, and have been most graphically described by my noble and learned friend who has just addressed the House. There is no real controversy about the facts. The question is what inference ought to be drawn from them. Here I have the misfortune to differ from my noble and learned friends who have just addressed the House. I have arrived at the same conclusion as that arrived at by Phillimore J. and the Court of Appeal. I cannot myself draw any other inference than that which they have drawn: Where was Mr. Winans' home—his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. . . .

In my opinion the appeal should be dismissed with costs.

Orders of the Court of Appeal and Queen's Bench Division reversed with costs here and below: the respondent to repay to the appellants the amount of the legacy duty paid by them: cause remitted to the King's Bench Division.

C. The Creation of a Privilege of Disproof

SWORDS v. OCCIDENT ELEVATOR CO.

Supreme Court of Montana, 1924. 72 Mont. 189, 232 P. 189.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Stated briefly, the facts out of which this controversy arose are that the Citizens' National Bank of Laurel held a chattel mortgage upon a crop of grain belonging to G. A. Starkweather to secure an indebtedness of something over \$17,000. The mortgage had been filed in the office of the county clerk and recorder, and, while it was still in full force and effect, the Occident Elevator Company purchased a portion of the mortgaged property, and paid the purchase price to Starkweather directly.

This action in conversion was instituted by the bank, through the receiver in charge of its business, to recover from the elevator company the value of the grain so purchased, and in the complaint the transactions are set forth at length. The answer is a general denial.

Upon the trial, and after the plaintiff had rested, the defendant sought to show that it purchased the grain in controversy from Starkweather and paid the purchase price to him directly under an agreement with the plaintiff bank that it might be done. The offered evidence was rejected, and the defendant having rested, a verdict was returned in favor of the plaintiff by direction of the court, and from the judgment entered thereon defendant appealed. . . .

When defendant sought to show that the grain had been purchased from Starkweather and the purchase price paid to him, by consent of the bank, counsel for plaintiff objected upon the ground that the manifest purpose was to prove a waiver which had not been pleaded. Upon the admission of counsel for defendant that such was the purpose, the objection was sustained and the offered evidence excluded. It is urged that the court erred in the ruling, and that the evidence was admissible under the general denial in the answer.

A general denial is authorized by statute (sec. 9137, Rev. Codes), and the effect of it is to put in issue every material allegation constituting the statement of plaintiff's cause of action, and casts upon the plaintiff the burden of establishing, *prima facie* at least, the presence of every element necessary to a re-

covery. (*Hickey v. Breen*,¹ 40 Mont. 368, 20 Ann. Cas. 429, 106 P. 881; *Chealey v. Purdy*, 54 Mont. 489, 171 P. 926.)²

"A conversion is any unauthorized act which deprives a man of his property permanently or for an indefinite time. . . . Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 P. 302.) From these definitions it follows that, to state a cause of action in conversion, plaintiff must disclose by his complaint that at the time of the alleged conversion he had a general or special ownership in the chattels, a right to the immediate possession thereof, the value of his interest, and that the acts of the defendant which deprived him thereof were wrongful. (*Interstate National Bank v. McCormick*, 67 Mont. 80, 214 P. 955.)

The general denial puts in issue all of these allegations, and any evidence which tends to negative any of them is admissible. *Chealey v. Purdy*, above. If in this action the bank consented to the sale of the grain by Starkweather to defendant and to the payment of the purchase price therefor to Starkweather directly, then the appropriation of the property by the defendant was not wrongful (*United States Nat. Bank v. Great Western Sugar Co.*, 60 Mont. 342, 199 P. 245), and plaintiff cannot complain under the familiar maxim "*volenti non fit injuria*,"—"he who consents to an act is not wronged by it." (Sec. 8744, Rev. Codes.)

After a conversion of mortgaged chattels has actually taken place, the mortgagee may waive the tort (26 R. C. L. 1144), or he may waive his lien upon the property at any time. (11 C. J. 674.)

The distinction between a waiver of the conversion and a waiver of the lien is important as it relates to the question of pleading. The defense that the tort has been waived admits that defendant converted the property and that plaintiff had a cause of action therefor, but seeks to show that plaintiff chose to treat the act as not wrongful and thereby to relinquish his right of action. Such a defense is in the nature of a confession and avoidance, which must be pleaded specially. It is such a defense as is required to be pleaded by subdivision 2 of section 9137, Revised Codes. (31 Cyc. 218; Bowers on Conversion, sec. 543.)

¹ See the abstract of this case, *supra* p. 605.

² Cf. *Coles v. Soulsby*, 21 Cal. 47, 50 (1862): "In our practice, a denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed."

In 38 Cyc. 2075, the general rule is stated as follows: "All defenses in bar are admissible under the general issue, except matters of confession and avoidance."

The defense that the mortgagee bank waived its lien before the property was taken by the defendant is a denial that the mortgagee had any interest in the property at the time it was taken. In this action, in order to prevail it was incumbent upon plaintiff to show some interest in the grain at the time of the alleged conversion (*Potter v. Lohse*, 31 Mont. 91, 77 P. 419; *Raymond v. Blancgrass*, 36 Mont. 449, 15 L. R. A., N. S., 976, 93 P. 648), and, since the bank claimed only a lien, by virtue of its mortgage, if it had waived that lien, it did not have any interest whatever. The general denial put in issue the plaintiff's claim of an existing interest, and under it defendant was entitled to show, if it could, that plaintiff did not have any interest in the grain at the time it was purchased. (*Pico v. Kalisher*, 55 Cal. 153; *Hopkins v. Dipert*, 11 Okl. 630, 69 P. 883; *Southern Car, M. & S. Co. v. Wagner*, 14 N. M. 195, 89 P. 259; *Haynes v. Kettenback Co.*, 11 Idaho 73, 81 P. 114; 38 Cyc. 2075; Bowers on Conversion, sec. 532.)

A waiver is the intentional relinquishment of a known right (*Murray v. Heinze*, 17 Mont. 353, 42 P. 1057; 27 R. C. L. 904; 8 Words and Phrases, First Series, 7375), and implies necessarily that the right was in existence at the time it is claimed to have been waived (*State ex rel. Driffill v. City of Anaconda*, 41 Mont. 577, 111 P. 345; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 P. 487).

When counsel for defendant conceded that the purpose of offering the evidence in question was to establish a waiver, he could not have referred to a waiver of the tort, for at the time to which the offered evidence relates no tort had been committed. His reference must have been to a waiver of the lien, and the offer clearly indicates that this was the purpose. The authorities are practically unanimous in holding that a mortgagee does waive his lien when he consents that the mortgaged property may be sold to a third person without reservation. (*Fincher v. Bennett*, 94 Ark. 165, 126 S. W. 392; *Brandt v. Daniels*, 45 Ill. 453; *Reese v. Kapp*, 82 Kan. 304, 108 P. 96; *Littlejohn v. Pearson*, 23 Neb. 192, 36 N. W. 477.)

In Bowers on Conversion, section 534, the general rule is stated as follows: "A general denial puts in issue the conversion of the goods, so that thereunder the defendant may prove any fact showing or tending to show that there was no conversion; thus it may be proven under a general denial that the taking of the goods by the defendant was by permission of the plaintiff and

according to an agreement between the parties." To the same effect is the text in 26 R. C. L. 1145.

The offered evidence was admissible under the general denial and the court erred in excluding it. . . .

The judgment is reversed and the cause is remanded for a new trial.

NOTE

Chealey v. Purdy, 54 Mont. 489, 491-493, 171 P. 926 (1918): Action to recover the value of work done and material furnished by plaintiff in drilling a well for defendants under an oral contract. "The first contention made is that the court erred to the prejudice of defendants in ruling that it was not competent for them, under their general denial, to show as defense that the contract as made by the parties was different in substantial particulars from that alleged in the complaint, and in excluding evidence offered for that purpose. . . . As an abstract proposition there can be no doubt, either on principle or authority, of the soundness of the rule invoked by counsel. Whatever may be the nature of the cause of action upon which a plaintiff seeks to recover, he must allege in his complaint facts disclosing the presence of all the elements necessary to make it out. (Rev. Codes, sec. 6532; *Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, 152 P. 481, L. R. A. 1916D, 836.) The answer may be a general denial (Rev. Codes, sec. 6540), the effect of which is to put in issue every material allegation constituting the cause of action alleged, and thus to cast upon the plaintiff the burden of establishing by his evidence, *prima facie* at least, the presence of every element of it, and hence his right to recover. If at the close of his evidence he has failed to do this, there is a total failure of proof and he is properly nonsuited. It logically follows that under his general denial the defendant may introduce any evidence which tends to controvert any fact material to plaintiff's case, and if he is successful in overcoming the *prima facie* case disclosed by plaintiff's evidence, as a whole, or in any particular, or in establishing an equipoise in the proof, he is entitled to a verdict. (1 Ency. Pl. & Pr. 817; *De Sandro v. Missoula L. & W. Co.*, 48 Mont. 226, 136 P. 711; *Stephens v. Conley*, 48 Mont. 352, 138 P. 189, Ann. Cas. 1915D, 958. These rules apply to all actions, whatever their nature"

Chapter XIII

AFFIRMATIVE DEFENSES¹

SECTION 1. WHAT IS "NEW MATTER"?²

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

Supra pp. 186-596.

NEW YORK CIVIL PRACTICE ACT

§ 261. Contents of Answer. (*Supra* p. 517.)

§ 242. Certain Facts to Be Plead. The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud,³ statute of limitations,⁴ release,⁵ payment,⁵ facts showing illegality⁶ either by statute, common law or statute of frauds.⁷ The application of this section shall not be confined to the instances enumerated.

ILLINOIS PRACTICE ACT

§ 43.¹ (Separate Counts and Defenses.) . . .

(4) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that an instrument or transaction is either void or voidable in point of law, or cannot

¹ See *Note on the Background of the Codes, supra* p. 508.

² See the discussion of this problem in Clark, *Code Pleading*, 606-612 (2d ed. 1947); 9 Wignmore, *Evidence*, §§ 2486, 2488 (3d ed. 1940); Morgan and Maguire, *Cases and Materials on Evidence*, 47 (2d ed. 1942).

³ See Clark, *op. cit. supra*, at 617.

⁴ See Clark, *op. cit. supra*, at 614; Atkinson, *Pleading the Statute of Limitations*, 36 Yale L. J. 914, 916 n. 9 (1927).

⁵ See Clark, *op. cit. supra*, at 615; Note, *May payment be proved under general issue or general denial, or must it be specially pleaded*, 100 A.L.R. 264 (1936); *Hughes v. Wachter*, 61 N. D. 513, 238 N.W. 776, 100 A.L.R. 255 (1931).

⁶ See Clark, *op. cit. supra*, at 616.

⁷ See Clark, *op. cit. supra*, at 613; Note, *Necessity of pleading the statute of frauds*, 49 L.R.A., N.S., 1 (1914).

¹ In the comment of the draftsman of the act upon this section it is stated [Illinois Practice Act Annotated, 106 (1933)]: "A denial must not be given such scope that it conceals the true nature of the defense."

be recovered upon by reason of any statute or by reason of non-delivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the plaintiff's complaint, or the defendant's counterclaim, in whole or in part, and any ground or defense, whether affirmative or not, which if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading. . . .

(b) Defenses: Form of Denials. (*Supra* p. 519.)

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction,² arbitration and award, assumption of risk,³ contributory negligence,³ discharge in bankruptcy, duress, estoppel,⁴ failure of consideration, fraud, illegality, injury by fellow servant,⁵ laches, license, payment, release, *res judicata*,⁶ statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . .

MITCHELL v. SWANWOOD COAL COMPANY

Supra p. 140.¹

CHESAPEAKE & OHIO RAILWAY COMPANY v. CARMICHAEL

Court of Appeals of Kentucky, 1944. 298 Ky. 769, 184 S.W.2d 91.

STANLEY, COMMISSIONER. The Chesapeake and Ohio Railway Company has moved for an appeal from a judgment for \$200

² See Clark, *op. cit. supra*, at 613; *Stone v. Webster*, 65 Idaho 392, 144 P.2d 466 (1943); *Budd Hoard Co. v. A. B. Kirschbaum Co.*, 115 Okl. 21, 242 P. 268 (1925).

³ See Clark, *op. cit. supra*, at 619; Note, *Burden of proof as to contributory negligence*, 33 L.R.A.,N.S., 1085 (1911). Cf. N. Y. Decedent Estate Law § 131: "On the trial of an action to recover damages for causing death, the contributory negligence of the person killed shall be a defense to be pleaded and proven by the defendant." See also N. Y. Civ. Prac. Act § 265, to the same effect.

⁴ See Clark, *op. cit. supra*, at 617.

⁵ See Clark, *op. cit. supra*, at 620.

⁶ See Note, *Pleading waiver, estoppel, and res judicata*, 120 A.L.R. 8 (1939); *Commercial Standard Insurance Co. v. Remay*, 58 Idaho 302, 72 P.2d 859, 120 A.L.R. 1 (1937).

¹ Cf. *Knight v. Emmons Brothers Co. and Jaffe v. Stone*, *supra* p. 143.

against it in favor of William Carmichael for damages alleged to have been caused his growing crops and fences by the negligence of the Railway Company in failing to keep open a drainage ditch and thereby permitting water to flow upon and flood his property. The motion is sustained and appeal granted.

The railroad runs east and west adjacent to plaintiff's property on the north. South of and parallel with the right of way is Stepstone Creek, which in normal times is small and shallow. Beyond that is a county road, and a fenced private way leads from it across the railroad into the plaintiff's farm. The creek and surface water flow eastwardly. The track is upon a three or four foot embankment and has the usual drainage ditch paralleling the track, between it and plaintiff's property, which also carries some surface water from a part of his land. Four culverts carry the water from this ditch under the track to where it flows a few feet into the creek. The bottom of the culverts is three or four feet above the bed or normal height of the water in the creek. The water must rise seven feet before it reaches the top of these culverts and stops or obstructs the drainage.

On the night of June 21, 1942, there was a heavy rainfall beginning about nine o'clock and lasting two or three hours. The creek overflowed the railroad and onto plaintiff's land for a considerable distance. It was two or three feet deep over the tracks and washed the ballast and roadbed for a distance of three miles to such extent that it took eleven days to repair the damage. The plaintiff testified that his wife woke him up about midnight and he saw water about thirty feet up in his place. He dressed and went down to the railroad and saw the ballast was washed out and the ties hanging to the rail. He testified that he had seen overflows at the place twice before, but not such property damage as on this occasion. His garden patch was ruined and a field of corn washed toward the east and covered with mud and debris. His fences had been knocked down toward the east and his private road washed out. The plaintiff only proved that the ditch paralleling the railroad had been permitted to fill up before this flood.

As often stated, the negligence for which the law imposes liability presupposes a legal duty, coupled with an injury resulting in direct and natural sequence from a breach of it. The court submitted to the jury the question of the defendant's negligence with respect to the drainage ditch and whether it had become inadequate to carry off the water in usual and ordinary floods and rainfalls in the vicinity and that such negligence had caused the plaintiff's damage. A special, separate instruction was given which authorized the jury to excuse the defendant from liability

if the jury believed the damage was caused by unusual and extraordinary rain and flood.

It is well established law that where damage is caused by a superior agency and without fault on the part of a defendant, or blame imputable to him, an action for damages is not maintainable.

It is tacitly conceded on the appeal that this rain and flood was of such an extraordinary degree and character as to be regarded as an act of God. But the appellee contends that the Railway Company should not have been permitted on the trial and may not now be permitted to rely upon the defense of vis major because it was not pleaded.¹

There is little authority on the question of whether an act of God must be specially pleaded as a defense. In 41 Am. Jur., Pleading, Sec. 159, it is stated that such an affirmative or special plea is required if the defendant expects to avail himself of that defense. *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, 88 N. W. 508, 56 L. R. A. 341, is cited as authority. That case is also cited in support of a similar text in 45 C. J. 1113. But the opinion seems to hold that an instruction on that defense was properly refused because there was neither pleading nor proof. However, it is held in Oklahoma and Montana that the defense must be specially pleaded; but in Maryland that it does not, and that the defense may be relied upon under the general issue. *Sand Springs Railway Company v. Baldridge*, 60 Okl. 102, 159 P. 487; *Orient Ins. Company v. Northern Pacific Railway Company*, 31 Mont. 502, 78 P. 1036; *Gault v. Humes*, 20 Md. 297.

It seems to us that, in order to introduce evidence that it was, there need be no affirmative or special plea that the flooding of plaintiff's property was caused by an act of God, and that it is sufficient for the defendant to deny that the damage was caused by his negligence. If a plaintiff may plead negligence in general terms and prove any negligent act, so may a defendant deny negligence generally and prove anything relevant to show that the claimed damage was not caused by him but was caused by a third person or his instrumentality. By a general denial the de-

¹ Cf. Clark, Code Pleading, 607 (2d ed. 1947): "Though, as we have seen, denials and defenses are considered distinct pleas, as were traverses and pleas in confession and avoidance, the line of demarcation between them is not clear. It is necessary to consider them together, since in practice one is the converse of the other. If a particular issue may be raised by a denial, an affirmative defense is not necessary, and is usually viewed as objectionable; but, if it may not be so raised, it must be pleaded as an affirmative defense; or evidence on the issue is not admissible at the trial. Thus if a denial of an allegation of the defendant's negligence contained in the complaint will permit the defendant to show that the plaintiff was contributorily negligent, he should not make affirmative allegations of the plaintiff's own negligence; but he must do so to protect himself if a denial is not so treated."

defendant puts the burden upon the plaintiff to prove his case, and in response the defendant ought to be permitted to point to some other cause of the plaintiff's injury. To illustrate: A sues B and alleges that his automobile struck and injured the plaintiff. It could not be doubted that under a general traverse B could prove that it was not his car but one in front of him that struck the plaintiff. That may be regarded as an affirmative defense, but it is not new matter. It simply buttresses the defendant's denial.² As stated in 41 Am. Jur., Pleading, Sec. 366:

"A general denial puts in issue every material allegation of the complaint, except those admitted. It goes to the root of the cause of action and permits the introduction of any proper evidence tending to controvert the facts which the plaintiff must establish to sustain his case. Any fact which goes to destroy, not to avoid, the plaintiff's cause of action is provable under the general denial, including facts independent of those averred in the complaint, of an affirmative character, but which have a negative effect upon the issues." [Citations omitted.]

So in a case of this kind the defendant may not only contradict evidence that he was in fault but may prove that an instrumentality of another neighbor or an unprecedented flood caused the plaintiff's damage and not he. That is not a confession and avoidance, which is generally the character of defense that must be pleaded specially.

There is no difficulty in reaching the conclusion that evidence on the point was relevant and competent. It is very apparent that the failure of the Railway Company to keep open its drainage ditch alongside the track had nothing to do with the flooding of plaintiff's property. It would have occurred had that ditch been five feet deep and clear and clean, for, as we have said, the water covered all the right of way and extended beyond over plaintiff's land in the same way several feet deep. It ran in a swift current down the valley.

We need not here express an opinion as to whether a defendant is entitled to a special instruction on an act of God or unprecedented rain as the efficient cause of plaintiff's damage if he does not plead it specially. The point upon which we decide the case is the evidence, and that evidence was such as to require, in our opinion, that the court peremptorily instruct the jury to find for the defendant.

Wherefore the judgment is reversed.

Whole Court sitting.

² Cf. *Cella v. Roth*, *supra* p. 605.

PIERCY v. SABIN

Supreme Court of California, 1858. 10 Cal. 22.

BURNETT, J., delivered the opinion of the Court. TERRY, C. J., and FIELD, J., concurring.

This was an action to recover the possession of land. The defendants simply denied the allegations of the complaint; the plaintiff had judgment, and the defendants appealed. . . .

The second error assigned is, that the Court erred in excluding the record of a former suit.

Under the old system of pleading, a former recovery could be given in evidence under the general issue, in assumpsit, trover, case, and ejectment. [Citations omitted.] But the question arises whether our Code has not changed the former rule upon this subject. Under Section 46 there are only two classes of defense allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in *all* cases.

The plaintiff is required to state in his complaint the facts that constitute his cause of action; and it seems to have been the intention of the Code to adopt the true and just rule, that the defendant must either deny the facts as alleged, or confess and avoid them.¹ It is certain that where new matter exists it must be stated in the answer. The answer "shall contain a statement of any new matter constituting a defense." The language of this section is very clear, that this new matter, whatever it may be, must be set up in the answer. The question then arises: what is "new matter" in the contemplation of the Code itself? New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter.² A defense that concedes that the plaintiff *once* had a good cause

¹ How is it determined what "facts," of all those which are material to a particular controversy, constitute the plaintiff's cause of action. Cf. 9 Wigmore, *op. cit. supra* n. 2, at § 2486: "It is sometimes said that [the burden of proving a fact] is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential."

² Are the question whether a defendant has the burden of proving any proposition about a matter of fact which is material to a particular controversy and the question whether the defendant has the burden of alleging that proposition, different questions or different forms of the same question? If a litigant who has the burden of pleading a particular material proposition usually has also the burden of proving it, is the test of "new matter," stated by the court, a helpful one?

of action, but insists that it no *longer* exists, involves new matter. (1 Ch. Pl. 472; *Gilbert v. Cram*, 12 How. Pr. 445; *Radde v. Buckgaher*, 3 Duer, 685; 2 Kernan, 17.)

If facts which occur subsequent to the date of the original transaction do not constitute *new* matter, what facts do constitute it?³ And if any subsequent matter can properly be called "new matter," must not *all* subsequent matters be equally entitled to the same designation? The language of the Code is explicit that the "answer shall contain a statement of *any* new matter constituting a defense." The Code makes no distinction between different classes of new matter. *All* new matter of defense must be stated in the answer.

This feature of the Code is one of the most beneficial and obvious improvements upon the former system. This classification of defenses is simple, logical, and just. Each party is distinctly apprised of all the allegations to be proven by the other; and each is, therefore, prepared to meet the proofs of his adversary. The plaintiff is compelled to set out every fact necessary to constitute his cause of action, and the defendant every new matter of defense. This is required by the true principles of pleading.⁴ (1 Ch. Pl. 526.)

Two of the leading ends contemplated by the Code are simplicity and economy. (*Adams v. Hackett*, 7 Cal. 187.) As contributing to the attainment of these ends it was the intention of the Code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them, respectively, but to narrow the proofs upon the trial.⁵ This intention is clearly shown, not only by the spirit and general scope of the system, but by particular provisions. The different provisions of the Act, when construed together and legitimately applied, lead to this conclusion. . . .

These regulations restored the ancient rule, and placed the science of pleading upon its true principle. The framers of the New York Code, from which ours is mainly taken, would seem to have intended to accomplish the same result. It has been there held, and seems now to be the well-settled rule, that new matter must be set forth in the answer. Payment, an award, or a former recovery, must be pleaded. (*Calkins v. Parker*, 21 Barb. 275;

³ What are the limits of an "original transaction"? Do they include, for example, the contributory negligence of the victim of an automobile accident, or a buyer's payment for merchandise which he has bought on credit?

⁴ Cf. Clark, *Code Pleading*, 607-608 (2d ed. 1947).

⁵ What difference does it make from the point of view of notice and of narrowing the proofs whether the burden of pleading and proving a particular material proposition, which is denied, is placed upon the plaintiff or the defendant?

Brazil v. Isham, 2 Ker. 17.) Such defenses admit the contract as alleged, but avoid it by matter *ex post facto*. . . .

There was no error in refusing the copy of the record of the former recovery, as the answer of defendants contained a simple denial of the allegations of the complaint. . . .

Judgment affirmed.⁶

NOTE

Stoddard v. Onondaga Annual Conference, 12 Barb. 573, 576 (N. Y. Sup. Ct. 1851): "New matter constituting a defense, under the code, must be taken to mean, some fact, which the plaintiff is not bound to prove, in order to make out his cause of action, and which goes in avoidance or discharge of the cause of action alledged in the complaint. If the plaintiff is bound to prove a fact in order to establish his cause of action, not alledged in his complaint, the defendant need not alledge the contrary in his answer.⁷ He may controvert such fact upon the trial, on the introduction of the evidence by the other party, without any allegation in his answer upon the subject. Any allegation in the answer in regard to such matter would be entirely unnecessary and improper. But every matter of fact which goes to defeat the cause of action, and which the plaintiff is not under the necessity of proving in order to make out his cause, must be alledged in the answer; there being now no general issue under which it may be proved. This is new matter. It admits the cause of action alledged, as once existing, but avoids it."

WYMAN v. McCARTHY

Supreme Court of Colorado, 1933. 93 Colo. 340, 26 P.2d 245.

MR. JUSTICE BUTLER delivered the opinion of the court.

In a replevin action Jerry C. McCarthy recovered judgment against Walter Wyman for the possession of eighteen head of cattle and for \$170.10 for the unlawful detention thereof. We are asked to reverse the judgment.

1. In one defense Wyman denied that McCarthy was the owner and entitled to the possession of the cattle. For a further answer and by way of counterclaim, Wyman alleged that the parties entered into an agreement in the nature of a joint adventure concerning cattle; that pursuant to the agreement, McCarthy sold all the cattle except the eighteen head involved in this action; that McCarthy sold the eighteen head to Wyman for \$1,305, the purchase price to be deducted from Wyman's share of the profits of the joint adventure; and that an accounting would show that McCarthy is indebted to Wyman in the sum of

⁶ Cf. *Tung-Sol Lamp Works v. Monroe*, 113 Vt. 228, 32 A.2d 120 (1943).

⁷ But how is it determined whether or not a "fact" is one which a plaintiff is bound to prove in order to establish his cause of action?

\$1,669.93, for which amount Wyman prayed judgment. On McCarthy's motion, the allegations were stricken from the answer. We cannot sustain Wyman's exception to the ruling. On no theory of the case did the allegations have a proper place in the pleading.

(a) Viewing the allegations as a further answer, they were improper. They did not constitute "new matter" within the meaning of section 62 of the Code of Civil Procedure. Affirmative matter requiring a special plea must be in avoidance; it is consistent with the plaintiff's cause of action, but operates to defeat it. If the matter pleaded is inconsistent with the plaintiff's claim, its only effect is to disprove it, and it is admissible in support of a denial. *Hallack-Sayre-Newton Lumber Co. v. Blake*, 4 Colo. App. 486, 36 P. 554. In *Cuenin v. Halbouer*, 32 Colo. 51, 74 P. 885, the plaintiffs alleged that they were entitled to the possession of certain real property. The answer denied that the plaintiffs were entitled to such possession. As a third defense, the defendant affirmatively pleaded facts tending to show that the deed under which the plaintiff claimed title was void. We said: "But under no rule of pleading can it be said that the matters set up in the third defense of this answer are new matters which require a replication. Considered in the light most favorable to defendants, the facts alleged therein are only probative in nature, tending if true, to show the defects of plaintiffs' title, and if admissible at all, are so under the general denial." See also *Mott v. Baxter*, 29 Colo. 418, 68 P. 220. In Pomeroy's Code Remedies (Fifth Ed., 1929), section 567, the law is stated in these words: "The overwhelming weight of judicial opinion has with almost complete unanimity agreed upon the principle which distinguishes denials from new matter, and determines the office and function of each. The general denial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact, not inconsistent with the truth of all those allegations, is new matter.¹ It is said to be 'new,' because it is not embraced within the statements of fact made by the plaintiff; it exists outside of the narrative which he has given; and proving it to be true *does not disprove a single averment of fact* in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's

¹ Does this "principle" enable you to distinguish between negative and affirmative defenses?

rights and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true.² Such is the nature of the new matter which cannot be presented by means of a denial, but must be specially pleaded, so that the plaintiff may be informed of its existence and of the use to be made of it by the defendant." Evidence of the matter specially pleaded was admissible (and was admitted at the trial) under the specific denial; in fact, the allegations constituted an argumentative denial, and therefore were redundant. They were properly stricken. *Bolton v. Missouri Pac. Ry. Co.*, 172 Mo. 92, 72 S. W. 530.

I have dealt at some length with this subject because one of the justices takes a different view of the rules of pleading, which view he expresses in a concurring opinion.³

(b) The counterclaim was properly stricken. It did not arise out of the transaction set forth in the complaint, nor was it connected with the subject of the action. Code of Civil Procedure, § 63; *Mason v. General Machinery & Supply Co.*, 91 Colo. 69, 11 P. (2d) 802; *Mason Tire Sales Co. v. Mason Tire & Rubber Co.*, 73 Colo. 42, 213 P. 117. . . .

Replevin is a possessory action, and as McCarthy is entitled to the possession of the cattle involved in this action, the verdict and judgment in his favor are right.

As we find no error in the record, the judgment is affirmed.

FIRST NATIONAL BANK v. FORD

Supreme Court of Wyoming, 1923. 30 Wyo. 110, 216 P. 691.

BLUME, JUSTICE. This is an action brought by First National Bank of Morrill, as plaintiff, against John B. Ford, as defendant, on a promissory note dated June 9, 1917, due in six months, payable to the Gifford Motor Co. for \$450.00. The petition is in the usual form. The defendant filed an answer denying that he ever executed a note to the Gifford Motor Company for \$450.00, but that the note sued on is a forgery; that on June 9, 1917, he executed to the Gifford Motor Company his promissory note for \$150.00; that if the signature on the note in suit is his genuine signature, the note was fraudulently altered and forged to the sum of \$450.00, without the knowledge or consent of defendant. The plaintiff filed a reply denying the allegations of the answer.

² Does this mean that it is in the power of plaintiffs, by judiciously choosing what to allege and what not to allege in their complaints, to determine what is and what is not new matter? Cf. *Lisbon v. Lyman*, 49 N.H. 553, 565 (1870): "A plaintiff must affirm every fact necessary to the maintenance of his action . . ."

³ The concurring opinion of Adams, C.J., is omitted.

At the outset of the case it was apparently agreed that at the time of the commencement of the action, plaintiff held the note as collateral security for a debt of the Gifford Motor Co., but that since that time the debt had been paid. The case was accordingly tried on the theory that the plaintiff was only the nominal plaintiff. The case was tried to a jury which returned a verdict for the plaintiff for the amount claimed, judgment was entered on the verdict, and the case is here on direct appeal.

Upon the trial of the case the defendant admitted that he signed the note in question, but claimed that it was given for only \$150.00. The note introduced shows no alteration apparent on its face. The court instructed the jury in instruction No. 1 that they were the sole judges of the facts; in instruction No. 2 that, the defendant having admitted his signature to the note, the only question of fact for them to determine was whether the note was originally given for \$150.00 or \$450.00; if the former they should find for the defendant, if the latter, for the plaintiff. The third instruction, and the last of substance, told the jury as follows:

"The court instructs the jury that the burden of proving that said note was altered so as to raise the amount thereof from \$150.00 to \$450.00 is upon the defendant, and these facts must be established by clear and convincing proof in order to constitute a defense to plaintiff's action."

1. Defendant complains that the burden of proof of showing the alteration contended for was, by the third instruction of the court, imposed on him. . . .

[In the part of the opinion omitted at this point the court said that "the solution of the question, whether the instruction . . . is or is not erroneous, depends entirely on whether the claim of alteration, made by the defendant, is or is not an affirmative defense"; that "the question of pleading and of burden of proof go hand in hand; if the claim of alteration is affirmative, it must be specially pleaded and proved by the party relying thereon"; but "that there seems to be no invariable test to determine what is and what is not an affirmative defense." The court points out (1) that in some jurisdictions the rule is that "where no alteration is apparent on the face of the instrument, the burden of proving that there has in fact been an alteration is on the party alleging it," but that in some of those jurisdictions the defense may be proved under a general denial; and (2) that in other jurisdictions the rule in such a case is "that though proof of the signature and the introduction of the note in evidence . . . make out a prima facie case for plaintiff, compelling the defendant to go forward with the evidence, the burden of proof,

nevertheless, where the execution of the instrument is denied . . . , remains upon plaintiff to satisfy the jury, upon the whole evidence, that the instrument introduced is the identical instrument executed by defendant and that no alterations have been made therein." The latter rule, the court adds, proceeds "upon the theory that the plaintiff must . . . prove his case, one element of which is that the document sued on is the identical document executed by defendant."]

There is contained . . . considerable logic in the position thus taken. But a different viewpoint may be adopted with reason. Looking at the question from a different angle, the claim of alteration is a claim both confessing and avoiding. Under a plea of that kind the true burden of proof is always on the party setting it up since he then becomes the actor. [Citations omitted.] In such case, as applicable here, the claimant confesses that he executed the identical document in question, not exactly in the form then appearing, but still that document as it was originally; he admits its full validity at the time of its execution, but pleads in avoidance that at some time thereafter the instrument became void by reason of an alteration made therein. Hence while such a plea is not, perhaps, a true plea in confession and avoidance in all particulars, it is similar to it and hence, too, in accordance with the holding of a number of courts, it is an affirmative defense, which must be set up in order to admit of the introduction of any evidence of the alteration. [Citations omitted.]

. . . Logic in law must to some extent be tempered by considerations of public policy and justice. The premises from which conclusions are drawn may not always and invariably be applicable to a like extent. It was admirably said in *Spilene v. Salmon Falls Mfg. Co.*, 79 N. H. 326, 108 A. 808:

"The argument against the free application of the idea that under certain circumstances the defendant should be called upon to produce evidence rests in its final analysis upon the theory that, since the plaintiff makes a charge, he must prove it. But this general rule is not now, and never has been, carried to the extreme limit of its logic. Many defenses are treated as matters in confession and avoidance; and, when they are pleaded, the burden is put upon the defendant in both senses. He has the duty to go forward and produce evidence and also the risk of non-persuasion. If he is sued upon a promissory note, he must seasonably deny his signature, or his nonaction is taken as his admission of the signature. The logic of the general principle that the plaintiff should have the duty to go forward and the risk of non-persuasion has always been modified by the application of what was at the time deemed to be the common sense of

the situation. It may be that many of the cases have gone too far in this respect. It is undoubtedly true that the authorities are not harmonious; yet the essential soundness of the principle which they have sought to apply cannot be doubted."

It is said in Wigmore on Ev. (2nd Ed.) Sec. 2488 that as to who has the burden of proof "depends ultimately on broad considerations of policy."¹ This, no doubt, is true, and applies equally to the proposition, as included in the former, as to what is and what is not an affirmative defense.

In the case at bar the defendant claims that the note in question was altered by raising the amount thereof from \$150.00 to \$450.00. If that is true, it is fraud and forgery, and in this case would directly involve the owner. If it was altered, it was done by him, or by some one with his knowledge and connivance. The charge is grave, and though this is not a criminal case, a finding to that effect would stamp the owner as a forger, and as an outlaw in his community, unworthy of the confidence of his fellowmen. Is it right that this fact should not affect the situation and should not be considered by courts? It is said in some cases where there was an alteration on the face of the instrument that there is no presumption either one way or the other. See Wigmore, *supra*, Sec. 2525; 2 C. J. 1276; note, 39

¹ See 9 Wigmore, *op. cit. supra* n. 2, at § 2486: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. Thus, in most actions of *tort* there are many possible justifying circumstances,—self-defence, leave and license, 'volenti non fit injuria,' and the like; but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ('false words,' in the old nomenclature), it might have been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. The controversy whether a plaintiff in *tort* should be required to prove his own carefulness, or the defendant should be required to prove the plaintiff's carelessness, has depended in part on experience as to a plaintiff being commonly careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available. Thus, no one principle will serve in *torts* as a guiding rule for the various cases. . . . There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness." [By permission of Little, Brown and Company, the publisher.]

L. R. A., N. S., 112. But this is not such a case. Here the presumption of innocence, that men act in good faith and not unlawfully, should operate in favor of plaintiff. . . . [T]here is no doubt that the facts of common experience . . . have influenced some of the courts in holding the claim of alteration of an instrument to be an affirmative defense. . . . Transactions in bills and notes are numberless. Thousands of notes are made and taken daily. Forgeries and fraud therein happen but seldom; they are the exception in innumerable cases; severe penalties are provided for those guilty thereof. When under these circumstances we put in the scale the logic of the position making such claim a negation of plaintiff's claim and the logic of the position making it an affirmative defense, and find that the scales nearly balance, public policy and a natural sense of justice step in, tipping the scale in favor of the latter. A defense of fraud is, at least under the system of Code pleading, almost universally regarded as new matter, as affirmative in its nature. . . . Where fraud enters into the making of a contract, there is lacking one of its essential elements for its validity. While a contract of that kind is voidable only, still the issue of fraud involves the question whether it ever was obligatory. . . . A plea of fraud, therefore, and evidence sustaining it, may, in strictness, well be said to merely negative the existence of the contract, if sued on. Such claim, in strict logic, might well be said not to be affirmative. But, as stated, courts have treated it as affirmative. . . . [W]e think that the real reason . . . is grounded in the reluctance of courts to treat cases involving these facts in the same light as other cases, and in the refusal to pass over lightly facts charging men with acts of commission often equivalent to crimes. An alteration of an instrument as claimed in the case at bar would be a fraud of the most vicious sort, and we think that the interests of the community would be most advanced, greater stability and security given to our commercial interests, and justice be attained in the greater number of cases, by not making an exception to the general rule when fraud is involved, but that we should hold, as we do, that in a case like that at bar at least, the defense of an alteration of an instrument is a true affirmative defense which must be proved by the party setting it up. In the case before us the defendant admitted on the trial that he signed the note in question. And while pleadings ordinarily determine upon whom rests the burden of proof, they cannot be used to escape the operation of the rule that an affirmative defense must be proved by the defendant. The situation here, therefore, should be treated the same as though the defendant had made the admission above mentioned in the pleadings, but had set up the plea of alteration in avoidance.

. . . The instruction, therefore, given in the case at bar, putting the burden of proof on the single issue of alteration on the defendant, was not error. . . .

We find no prejudicial error in the record. The judgment of the lower court should accordingly be affirmed and it is so ordered.

Affirmed.

NOTE

Clark, Code Pleading, 608-609 (2d ed. 1947): "As a practical matter the now prevailing considerations may be classified as historical precedent, logical inference, and views of policy. The first is of the utmost importance in a particular jurisdiction as to particular issues; where such precedents exist it is only rarely worth while to attempt to decide which of the other considerations led in the first instance to the local rule. The second may be applied where neither of the other two indicates an answer, though here too the others are often merely lurking in the background. For the logical deduction depends upon what the complaint must contain or is thought to contain, and that depends upon historical precedent or 'policy.' The third consideration, a vague inclusive one, is theoretically at least the most important. The rules seem to have developed from views of various courts as to what is fair and just to the parties or convenient in presenting a particular case."

MULRY v. MOHAWK VALLEY INSURANCE COMPANY

Supreme Judicial Court of Massachusetts, 1856. 5 Gray 541.

BIGELOW, J. The defendants in this case relied at the trial upon two grounds of defence to the claim of the plaintiff under his policy. . . .

The other ground of defence was that spirituous liquors were kept and sold on the premises by the defendant, at the time the policy was made and issued, and that this use of the premises was not stated by the defendant in his application for insurance, as required by the conditions annexed to the policy, and that for this reason, the plaintiff could not recover. This ground of defence was not set out by the defendants in their answer. It appeared however in the course of the trial, on the cross-examination of the plaintiff's witnesses, that the premises were so used by the defendant at the time of making his application and at the date of his policy. Upon this state of facts, which was not controverted by the plaintiff at the trial, the defendants contended, and asked the court to rule, that the plaintiff, upon a just construction of the policy, and of the terms and conditions annexed to it, could not recover. The judge who presided at the

trial refused so to rule, and it is upon this refusal, that the case now comes before the whole court.

We have not found it necessary to determine whether the facts disclosed by the plaintiff's witnesses, as to the use of the premises at the time the policy was issued, would render it void; because we are of opinion that this defence is not open to the defendants, inasmuch as it was not set forth in their answer. Formerly, by pleading the general issue, every thing was open to proof, which went to show that the plaintiff's claim was invalid through fraud or illegality, or was in its inception void in law. *Hulet v. Stratton*, 5 Cush. 539. *Dixie v. Abbott*, 7 Cush. 610. But the practice act, *St.* 1852, *c.* 312, by abolishing the general issue, and substituting therefor an answer which is required to contain precise, certain and substantial averments and denials, and providing that every matter averred in the declaration, and not denied by the answer, shall be deemed to be admitted, effected a material change, not only in the forms of pleading, but also in the mode of making up issues of fact between the parties. There being now no general form of denying the plaintiff's right to recover, the defendant is compelled by §§ 14, 26, to deny every substantive fact alleged by the plaintiff in his declaration, or declare his ignorance thereof and leave the plaintiff to his proof. These provisions enable the defendant, by an answer denying the plaintiff's allegations, to put in issue only such matters as are properly averred in the plaintiff's declaration. The plaintiff, by § 2, is required to make no allegations except those which he is bound by law to prove. Therefore the defendant, by merely answering the allegations in the plaintiff's declaration, can try only such questions of fact as are necessary to sustain the plaintiff's case. He cannot thus put in issue matters which go to defeat or avoid it; and it is accordingly provided by § 18, that the answer shall set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action; by which are intended to be embraced all matters which cannot be proved under the denial of the allegations in the plaintiff's declaration. It follows, as a necessary consequence, that whenever a defendant intends to rest his defence upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in clear and precise terms in his answer; and as the plaintiff is not bound to aver any thing which tends to defeat his action, or which shows that his claim is illegal or void in its inception or otherwise, all such matters must be set out and averred in the answer under the eighteenth section of the practice act. This constitutes the main difference between the system of pleading

established by the practice act and that which was previously in force. Thus understood and administered, it is plain that the practice act is intended to bring the parties to a cause by their pleadings to clear and precise issues of fact, and all immaterial and unnecessary averments are wholly excluded. . . .

Applying this construction of the statute to the answer of the defendants in the case at bar, it is manifest that the defence relied upon was not open to the defendants. Proof that the policy was void in its inception, by reason of misrepresentation or concealment on the part of the plaintiff of material facts, was clearly in avoidance of the action. It did not come within any of the allegations contained in the plaintiff's declaration. He was not bound to aver or prove any such fact. It was for the defendants to allege and prove it as a distinct substantive ground of defence.

It was urged at the argument, that it was always competent for the defendant to take advantage of any matter in defence to an action, which was disclosed by the plaintiff's own testimony. This was true to a certain extent, when the general issue was pleaded, because under it all matters which tended to prove the original invalidity of the plaintiff's claim were open and competent to be proved. But, for the reasons already given, it is otherwise under the system of pleading established by the practice act. Nothing is open and competent to be proved, except what is comprehended in the distinct averments and denials of the parties. All other matters are irrelevant to the issue. Strictly speaking, therefore, all the evidence drawn out of the plaintiff's witnesses on cross-examination, which tended to show that spirituous liquors were kept and sold on the premises at the time of making the policy, was incompetent and irrelevant, because no such issue was before the jury on the pleadings. It might therefore have been properly excluded; but being in, it cannot be used to defeat the plaintiff's claim on a ground not set out in the answer.

Of course, it is always in the power of the court, in the exercise of its discretion, to allow amendments to the answer of a defendant, where facts material to the defence are disclosed by the testimony of the plaintiff, which, by the use of due diligence, could not have been known to the defendant so that he could avail himself of them in his answer. But in the case at bar no such surprise was shown as would warrant the allowance of an amendment to the answer; and none was in fact moved for at the trial.

. . .

*Exceptions overruled.*¹

¹ Cf. *Denham v. Bryant*, 139 Mass. 110, 28 N.E. 691 (1884), in which defendants relied upon, but did not plead, facts in avoidance of plaintiff's claim.

NOTES

(1) *Quinlivan v. Brown Oil Co.*, 96 Mont. 147, 29 P. 2d 374 (1934): Defendant, a dealer in gasoline, controlled a number of service stations, one of which it leased to Sayer. The lease provided that Sayer would sell the gasoline supplied him by defendant at the price at which defendant sold gasoline at its other service stations, and that "any attempt to evade this clause shall be just cause for cancelling this agreement." Shortly thereafter Sayer and plaintiffs entered into an agreement whereby plaintiffs agreed to sell, and Sayer agreed to redeem, not more than 500 books of coupons "which, upon the making of certain purchases at Sayer's service station, would entitle the purchaser to one gallon of gasoline free." Upon learning of this agreement, defendant notified Sayer that the redemption of these coupons was a violation of his agreement with defendant, and Sayer then notified plaintiffs and the public that he would no longer redeem them. Prior to that time plaintiffs had sold 170 of the coupon books, and were unable to sell any more thereafter. Plaintiffs brought this action against defendant for interfering with their contractual relations with Sayer. In their complaint they alleged that defendant induced Sayer to violate his agreement with plaintiffs by threatening to cancel his lease, and that defendant "had no right or authority to cancel said lease nor to interfere with the performance of said contract." This allegation defendant denied, but it "did not plead any justification." On appeal from a judgment for defendant, plaintiffs therefore contended that defendant could not avail itself of that defense, "because it is affirmative matter." *Affirmed*. Plaintiffs "set up in negative form the very facts" which defendant otherwise would have had to plead affirmatively, and when defendant denied those allegations it "raised the issue just as completely as though it had affirmatively pleaded the facts relied upon as constituting justification." Moreover, these facts were "testified to by plaintiffs' witness." Hence, the defendant "cannot be deprived of the right to prove justification as a defense."²

(2) *R. J. Bearings Corporation v. Warr*, 192 Okl. 133, 134 P. 2d 355 (1943): Plaintiff and defendant entered into an agreement whereby in consideration of plaintiff's selling goods on credit to Burney and Warr Supply Co., defendant guaranteed that the Supply Co. would pay therefor promptly, and agreed to indemnify plaintiff against "costs and attorneys' fees incurred in attempting to enforce payment thereof." The Supply Co. did not pay for the merchandise and plaintiff demanded payment of defendant. "Defendant paid this account in installments over a period of several months," and, after he had done so, plaintiff demanded that he also pay the expense which plain-

The court therefore held that, as the pleadings stood, the trial judge erred in permitting defendants to prove those facts. But it appeared to the court that the merits of the case had been fully and fairly tried, and plaintiffs asked no continuance on the ground of any surprise. The court therefore also held "that the defendants should now be allowed to amend their answer, on such terms as appear just to the Superior Court; and on filing such amendment, the entry will be, *Exceptions overruled*." See also *De Sandro v. Missoula Light & Power Co.*, 48 Mont. 226, 136 P. 711 (1913).

² See Clark, Code Pleading, 621 (2d ed. 1947).

tiff had incurred for attorneys' fees "in collecting the indebtedness." Defendant refused to do so, and plaintiff brought this action. "Among other defenses set up by the defendant was that of payment." At the trial defendant proved by the cross-examination of plaintiff's witnesses³ that plaintiff's attorney had written defendant that plaintiff had instructed him to sue defendant for the balance due plaintiff by the Supply Co. and "all costs of collection and attorney's fees," and that if defendant did not pay the balance he would carry out his instructions. Defendant also proved that after he received this letter he sent plaintiff's attorney a check for the balance, payable to plaintiff and endorsed: "In full settlement of all indebtedness of the Supply Co. to the R. J. Bearings Corporation to date," and that plaintiff cashed this check. At the close of the plaintiff's evidence defendant demurred thereto on the ground that it showed an accord and satisfaction. Judgment was rendered for defendant and plaintiff appealed, contending that "defendant is not authorized to raise this issue (of accord and satisfaction) since he did not plead it." *Affirmed*. (i) "Accord and satisfaction is an affirmative defense [different from the defense of payment] and it must be pleaded to be available as a defense." It is "an agreement whereby one undertakes to give or perform and another undertakes to accept in satisfaction of an unliquidated claim other than or different from what he is or considers himself entitled to, and a satisfaction is the execution of such an agreement." Plaintiff's claim for attorney's fees was unliquidated, and the letter of plaintiff's attorney invited defendant to pay the balance due plaintiff for merchandise sold the Supply Co. and thus to avoid suit and the costs of suit. Defendant accepted this invitation by sending his check. There was thus an accord and satisfaction. (ii) "Where evidence is introduced without objection upon a point not in issue in the case, the court may consider the pleadings amended to conform to the evidence if such evidence will support the judgment rendered."⁴

(3) *Richter v. Adams*, 19 Cal.App.2d 572, 576-577, 66 P. 2d 226 (1937): "[T]he only issue presented by the original pleadings was whether or not the defendants had complied specifical-

³ *Cf. Mitchell v. City of Portland*, 159 Or. 91, 98, 78 P.2d 582 (1938): "The plaintiff's evidence disclosed payment to Shieve; in other words, the latter's employment and payment were not proved by challenged testimony. Under these circumstances, the plaintiff cannot claim to have been prejudiced through surprise or inadequate opportunity to produce evidence when the appropriate legal principles were applied to these facts, for the verity of which he himself vouched."

⁴ *Cf. Idaho State Merchants' Protective Association v. Roche*, 53 Idaho 115, 119, 22 P.2d 136 (1933): "Evidence received without objection enlarges the pleadings." *Cf. also Paxton Realty Corporation v. Peaker*, 212 Ind. 480, 9 N.E.2d 96 (1937); *Brotherhood of Railway Trainmen v. Long*, 186 Ark. 320, 53 S.W.2d 433 (1932); *Schmidt v. United States*, 63 F.2d 390 (C.C.A. 8th 1933); *Dacus v. Burns*, *supra* p. 402; *J. R. Watkins Co. v. Chapman*, *supra* p. 404; *George v. Jensen*, *supra* p. 405. But see *Prisant v. Feingold*, 169 Ga. 864, 867, 151 S.E. 799 (1930): "That a plaintiff can not maintain a pending action because the subject-matter thereof had been previously adjudicated in favor of the defendants is a defense which must be set up by special plea, unless the facts on which it is based appear on the face of the petition, and can not, in the absence of such plea or the appearance of such facts in the answer, be urged in defense of the pending suit, though it may be predicated on evidence admitted without objection, or even upon the admission by the plaintiff as to such former adjudication."

ly with the terms of the written agreement of purchase. The court permitted evidence of a parol agreement to be received and then allowed defendants to file an amendment to conform to that testimony." This was *erroneous*. (i) As it is said in 21 Cal. Jur. 136, the failure to plead a defense is not cured by the introduction without objection of evidence in support of it, although the rule seems to be otherwise when there is merely an omission of an essential allegation. (ii) "Neither can it be charged that the subsequent amendment to conform to the proof cured the error in the admission of this evidence. . . . The law appears to be well settled that an amendment to conform to the proof is not proper where such amendment has the effect of introducing a new cause of action or defense."⁵

SECTION 2. THE SUBSTANTIVE ADEQUACY OF THE FACTS STATED

PROBLEMS

(1) Suppose that the propositions which are material to a cause of action are P_1 , P_2 and P_3 , that a complaint alleges each of those propositions, and that the answer alleges P_4 and P_5 , neither of which is the contradictory of or inconsistent with P_1 , P_2 or P_3 : What is the rule of substantive law which is implicit in the answer?

(2) By what criterion or criteria can it be determined whether an answer which interposes only affirmative defenses is sufficient in law?

HUTCHINSON v. SANGSTER

Supreme Court of Iowa, 1854. 4 Greene 340.

Opinion by GREENE, J. Charles C. Sangster filed his petition against Robert Hutchinson, claiming \$3000 damages for trespass and false imprisonment. Defendant's answer denies or justifies all of the allegations in the petition. A demurrer to the answer, averring that it "does not show a substantial cause of defense," was sustained. . . .

Verdict and judgment of \$5 against defendant, who appeals. . . .

Did the court err in sustaining the demurrer to defendant's answer? The answer should specifically deny, or admitting, should set forth that which would justify and avoid every material allegation in the petition. We think the answer in this case sufficiently traverses or avoids every fact upon which the plaintiff's action is founded. The denials are specific; and in

⁵ Cf. the cases *supra* p 432 ff., dealing with the question whether or not a complaint may be so amended as to change the cause of action.

avoidance, the answer sets forth with more than necessary detail, and with sufficient clearness, that, at the time of the alleged trespass, the defendant was marshal of Iowa city, and a conservator of the peace; that the plaintiff came into the Baptist church, in a state of intoxication, while the choir of said church were engaged in singing, and, with other persons, made a noise and disturbance to the annoyance of the choir; that he was requested by the defendant, as marshal, to leave the church, and thereupon became more noisy and much enraged; and on being put out of the church, refused to go away; that he threatened and insisted on fighting; that the defendant, in order to prevent a breach of the peace, arrested plaintiff while he was thus threatening to fight, and as he was so intoxicated as to be unfit for examination, and the defendant, not being able to find the mayor of the city, or any other judicial officer, before whom he could be taken for examination, took the plaintiff to the county jail, until such time as a judicial officer could be found, and until the plaintiff became sufficiently sober to undergo an examination; that he was thus necessarily detained in jail from one to two hours, and he was then discharged from custody by the mayor of the city; and that this and no other is the trespass complained of by the plaintiff.

The facts alleged in the answer, and which, so far as well pleaded, are admitted to be true by the demurrer, constitute a good defense to the petition. As marshal of Iowa city, the defendant was a conservator of the peace. Laws of 1833, Code 9, § 5823.

A peace officer may arrest a person for an offense committed or attempted in his presence. Code, § 2840. In this case an offense was not only attempted, but actually committed, according to the averments in the answer, which, under the demurrer, must be regarded as true. It is an offense, a violation of the public peace, "to make or excite any disturbance in any tavern, store," &c., "or at any public meetings, or in any other place where the citizens are peaceably and lawfully assembled," &c. Code, § 2742. An offense is attempted when a person undertakes to assault and resist an officer, or when an officer is threatened. The answer clearly shows that the officer was justified in making the arrest; and at common law he had the power to detain the offender till he could be taken before a magistrate for examination. 2 Jacob's Law Dic., 40; 1 Black. Com., 372; 4 *ib.*, 295; 1 Chitty's Cr. S., 19, 26; *Arnold v. Stevens*, 10 Wend., 514.

The averred intoxication of appellant, his consequent unfitness for examination, and the difficulty in finding a judicial

officer, justified the detention for a reasonable time. Two hours, under the circumstances, could not be deemed unnecessary or unreasonable.

The power to detain in custody, for a *reasonable time*, when an offense has been committed, or attempted, is indispensable to the duties of a peace officer. The power is inherent. The exercise of it often becomes unavoidable. The answer in the present case shows ample justification. . . .

Judgment reversed.¹

RUCKMAN v. CUDAHY PACKING CO.

Supreme Court of Iowa, 1941. 230 Iowa 1144, 300 N.W. 320.

STIGER, JUSTICE. Plaintiff brought this action to recover damages alleged to have been caused by the negligent parking of defendant's truck on a public highway. The trial court sustained plaintiff's motion to strike division one of the answer which reads: "1. That the plaintiff, at the time and place of the accident complained of by him, was operating a motor vehicle upon a highway in the State of Iowa without a valid license as an operator or chauffeur, and was not a person exempted from having a license; that the accident happened while he was so operating said motor vehicle without a license, and as a result thereof, he is not entitled to recover damages from the defendant."

Section 5013.01, Chapter 251.1, 1939 Code, reads: "5013.01 Operators and chauffeurs licensed. No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department of public safety. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

Section 5036.01, Chapter 251.1, 1939 Code, reads: "5036.01 Penalties for misdemeanor. It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter [251.1] or other law of this state declared to be a felony. Chapter 180 shall have no application in the prosecution of offenses committed in violation of this chapter.

"Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one

¹ On other grounds.

hundred dollars or by imprisonment for not more than thirty days."

There is no statutory provision as to civil liability for violation of the provisions of Chapter 251.1.

The question before us on this appeal is: "May a plaintiff who is required to have a license to operate a motor vehicle upon the public highways of Iowa as provided by section 5013.01 of the 1939 Code maintain an action in Iowa to recover damages sustained by him while he was operating a motor vehicle upon the Public Highway in Iowa without such license?"

The general rule, the rule established by the great weight of authority, is that the mere fact that the operator of a motor vehicle does not have a license or the fact that the motor vehicle is unregistered will not bar a recovery for injuries sustained to his person or property through the negligence of another unless there is a causal relation between his failure to comply with the law and the resulting injuries. [Citations omitted.]

In *Schuster v. Gillispie* . . . the defendant appellant contended that the fact that the driver of the car in which plaintiff was riding did not have a driver's license, as required by law, prevented a recovery on the part of plaintiff. In rejecting this contention, the court stated [217 Iowa 386, 251 N. W. 737]: "Appellant insists that this prevents recovery on the part of plaintiff. Appellant suggests no causal relationship between plaintiff's injuries and the fact that the driver of the car had no license and we are unable to discover any such relationship. Before a violation of a statute will preclude recovery, causal relationship must exist between the unlawful act and the injuries complained of."

In *Wolford v. City of Grinnell*, [179 Iowa 689, 161 N. W. 688], the court, in considering a defense that plaintiff was violating the law in driving his car without having it registered, said:

"As to the last proposition, it is clear that plaintiff's failure to register the car had nothing whatever to do with the accident; that there is no showing of any causal connection between plaintiff's violation of law and the accident, hence his violation of the law was no defense to the action. No authorities need be cited in support of this proposition; but we may properly refer in this connection to *Lockridge v. Minneapolis & St. L. R. Co.*, 161 Iowa 74, 140 N. W. 834, Ann. Cas. 1916A, 158.

"The law, as originally announced in Massachusetts and perhaps some other states, has never been recognized in this jurisdiction."

To sustain defendant's position on the issue before us, we would be compelled to hold that operating a motor vehicle on a highway makes the operator a trespasser and constitutes a nuisance which precludes recovery; that the omission of his statutory duty by the operator constitutes a causal connection with his injuries. In support of defendant's view of the law, it cites *Johnson v. Boston & M. R. R.*, 83 N. H. 350, 143 A. 516, 61 A. L. R. 1178, which holds that a failure of the operator of a motor vehicle to have a license is causal and bars a recovery. In Massachusetts this rule is applied where the motor vehicle is unregistered.

The law in New Hampshire and Massachusetts is in conflict with the general rule above stated. [Citations omitted.]

Because the challenged portion of the answer did not show a causal relation between the failure of plaintiff to have a license and the injuries complained of, the court was right in sustaining the motion to strike.

Affirmed.

DONALD v. DAVIS

Supreme Court of New Mexico, 1945. 49 N.M. 313, 163 P.2d 270.

BRICE, JUSTICE. This action was brought by appellee against appellant to recover judgment on a promissory note in the sum of \$901.44, together with interest and attorney's fees.

The appellant by his first amended answer admitted the execution and delivery of the note to appellee, but asserted "that there was no consideration, as shown by his affirmative defense" thereafter set forth. He admitted that the appellee was the owner and holder of the note; that demand had been made for payment; that the note was unpaid, and that it had been placed in the hands of an attorney for collection. The appellant's affirmative defense referred to, is as follows:

"That said note was given without consideration and under duress and the facts surrounding the signing and delivery of said note are as follows:

"(a) That prior to the delivery of said note, the plaintiff and defendant had entered into a joint enterprise, the conditions of which were that the plaintiff would furnish the capital for the defendant to buy certain cattle and handle the same until sold; and that plaintiff and defendant would share the profits and loss of said business.

"(b) That in accordance with the oral agreement between the plaintiff and defendant, the said defendant did buy certain cattle for the joint enterprise and at the time of the sale of

said cattle, there was a loss of approximately Twenty Eight Hundred (\$2800) Dollars.

"(c) That the defendant put into said joint enterprise the sum of Eighteen Hundred (\$1800) Dollars, which he lost in the said cattle deal and the plaintiff lost less than the defendant to the extent of five hundred dollars.

"(d) That the plaintiff many months after said cattle were sold at a loss, demanded from defendant that the defendant stand all the loss; and finally by threats of suit for what defendant alleges was an unfounded claim, defendant signed and delivered said note without consideration to his former partner under duress and not voluntarily because of the following circumstances:

"That at the time of being pressed by the plaintiff to sign said note, the defendant was in a serious financial condition, which fact was well known to the plaintiff; that said plaintiff knew at the time of the joint enterprise of the financial condition of defendant.

"That defendant, at the time said unfounded claim was being pressed upon him, owed large sums of money which he could not then liquidate and that a suit then would have caused a condition of such financial ruin that not only the defendant would have suffered great loss but said suit would have caused a great loss to all of his creditors; and thus the defendant signed said note, without consideration and under 'business compulsion' and involuntarily.

"Wherefore, defendant prays that plaintiff take nothing by his suit and for all proper relief."

The trial court entered an order sustaining appellee's motion to strike that portion of appellant's affirmative defense contained in the first amended answer "which plead that the note in question was executed under duress and not voluntarily." It expressly stated that the order did not apply to that portion of the answer "which directly or indirectly plead that the note in question was given without consideration," or, in the words of the court, contained in the order:

". . . and the Court does not sustain any exception to, or motion to strike those portions of the said answer setting up the execution of the note was without consideration, but the Court does hereby sustain the motion to strike those portions of the defendant's affirmative answer which sets up that the note was executed under duress and/or business compulsion and not voluntary; and the Court considers the motion to strike addressed to those portions of defendant's answer setting up duress and business compulsion as a demurrer. The Court sustains hereby,

in all things, the motion to strike or demurrer to those portions of defendant's affirmative defense identified before, and no further."

After the entry of the order sustaining in part appellee's motion to strike, the trial proceeded upon the merits, resulting in a judgment for appellee in the sum of \$1224.27 and costs. Want of consideration was appellee's only defense, and this was resolved against him.

The question presented to this court is whether the trial court erred in sustaining "the motion to strike or demurrer to that portion of the answer" in which it was alleged that the note sued on was executed under such duress and business compulsion as that it should be cancelled. For the purposes of this case, we must assume that the asserted facts are true.

Stated more concisely the facts stricken are in substance as follows:

The appellee threatened to sue the appellant on "an unfounded claim" which grew out of a joint adventure of the parties, unless the appellant would sign a promissory note for the amount of the losses appellee had sustained by such adventure. At that time, the appellant was indebted in large sums of money, of which appellee had knowledge, and the institution of the threatened suit "would have caused a condition of such financial ruin that not only he would have suffered great loss but it would have caused loss to all of his creditors." To avoid such serious consequences the appellant signed the note in suit as demanded by appellee.

We are of the opinion that the trial court did not err in striking the portion of the answer in question. There must be something more than a mere threat to sue upon an *unfounded claim* to amount to "business compulsion," though the dire effects asserted would follow the bringing of such suit.

"Unfounded" means

"(1) Unstable; untried. (2) Not founded; not built or established. (3) Having no foundation; baseless; vain; idle; as, unfounded expectations." Webster's International Dictionary.

An "unfounded claim," we conclude, is one without foundation in fact or law. *Fenwick Shipping Co. v. Clarke Brothers*, 133 Ga. 43, 65 S. E. 140.

A large per cent of contested suits are lost because alleged causes of action are based on "unfounded claims" as that phrase is herein defined. The appellee was in no different situation than thousands of litigants who have lost cases for the same reason. He had a right to sue or threaten suit on the unfounded

claim and the appellant to defend against it. There are some general statements by courts and text writers to the effect that if such threats are made in bad faith or without probable cause, and with no belief in the existence of a cause of action, contracts induced thereby are voidable, and are subject to cancellation. 5 Williston on Contracts, Sec. 1606; Restatement of Law of Restitution Sec. 71-a and comment. There is no charge here that the appellee acted in bad faith, or that he had no belief in the existence of a cause of action; assuming that such allegations would have been sufficient as against the motion to strike.

We have found no case involving similar facts which holds that the law of business compulsion applies thereto, and the appellant cites none. . . .¹

The case of Ramp Buildings Corp. v. Northwestern Bldg. Co., [164 Wash. 603, 4 P.2d 507, 79 A. L. R. 651, one of the cases cited by the appellant], was a case of "business compulsion." As here, a demurrer to the answer was sustained but the facts alleged were entirely different. The defendant in that suit had commenced the construction of a garage that would cost upwards of \$115,000, and had made arrangements to borrow \$75,000, secured by a mortgage on the property. The plaintiff, who claimed patents covering a system of staggered floor and ramp building construction useful in garages, notified the defendant and the mortgagee that it claimed defendant was using a system of construction which was included within the patents mentioned, and threatened that if he did not sign a contract to secure a right to the use of its patents the plaintiff would cause the mortgagee to refuse to furnish any further money and thereby prevent the construction of the building. The defendant was unable to continue the construction of his building, on which he had spent a large sum of money, without securing the proposed mortgage funds and was faced with bankruptcy. Under such compulsion he agreed to pay \$3465 for a license to use plaintiff's patents. He denied that plaintiff's patents were valid; he also denied that he had in any manner infringed upon such patents if valid. Under these facts it was held that the agreement to pay the license fee was obtained by business compulsion.

It was held in each of the other cases cited by appellee that the facts did not warrant a holding that the complainant's free will to contract was overcome by business compulsion. None of them support appellant's theory of the law.

¹ The court's enumeration of the cases cited by the appellant "for the purpose of supporting the rule relied upon," is omitted.

Each case of this kind must stand upon its own facts. But it may be said that as a general rule a mere threat to sue upon a claim, though unfounded, in which no person or property is otherwise involved, is not actionable duress or business compulsion, notwithstanding such threatened suit, if instituted, would have an injurious effect upon the credit of the person sued. . . .²

The judgment of the district court should be affirmed, and it is so ordered.

NOTE

Armstrong v. Shell, 200 Miss. 135, 26 So. 2d 344 (1946): "Appellant Armstrong, by a replevin proceeding, seized four mules, one wagon and two sets of harness in the possession of appellee Shell. Armstrong owned the property. Shell based his right to possession upon an oral contract he claims was previously made with Armstrong. It is admitted that this contract if made, was begun, negotiated and entirely concluded on Sunday. That rendered the contract invalid and unenforceable. . . . But appellee says that Armstrong did not properly invoke the illegality of the contract and that he is in *pari delicto* and cannot take advantage of it. One may invoke such invalidity either by plea or objection to the evidence of the contract when offered. Armstrong objected to the evidence and the objection was overruled. Armstrong is not in *pari delicto* because he is not attempting to enforce the contract. He says no such contract was made. His right is that of an owner. Shell, not Armstrong, is grounding his right on the contract and trying to enforce it."

NEWPORT SAVINGS BANK v. MANLEY

Supreme Court of Vermont, 1946. 114 Vt. 347, 45 A.2d 199.

MOULTON, CHIEF JUSTICE. This cause, which is an action to recover a balance claimed to be due upon a promissory note, has been passed to this Court before final judgment upon the plaintiff's exception to the overruling of its demurrer to the defendant's answer, as provided by P. L. 2072.

An adequate reason for sustaining the ruling lies in the fact that the demurrer does not specify the reason why the answer is insufficient, as required by P. L. 1574, III.¹ The point does not appear to have been raised below and has not been briefed here, but we will affirm a ruling of a trial court upon any legal ground shown by the record. [Citations omitted.]

Furthermore, taking the issue as argued before us, the result is the same. The defense is based upon certain principles

² Citations of cases illustrative of what is meant by "business compulsion," are omitted.

¹ See Note, *The Required Specificity of the Code Demurrer*, *supra* p. 375.

of the law of the State of New Hampshire, which are claimed to govern the plaintiff's right of action. The answer contains an averment of an obligation of the plaintiff, elsewhere alleged to have been unfulfilled, followed by the statement that the proposition of law is to be found in two cited decisions of the New Hampshire Supreme Court, and by a reference to particular sections of the statutes of that State. The plaintiff's contention is, in substance, that this is not a proper method of pleading the law of another state, which should be set forth in the answer, as held in *Macauley v. Hyde*, 114 Vt. 198, 201, 42 A. 2d 482, and other cases, and is a mere conclusion of law and not an allegation of fact. But however indefinite or argumentative this averment may be, the fault is one of form and not of substance. Gould, Pleading, (4th Ed.) Chap. III, § 30; and see *Sheridan v. Sheridan*, 58 Vt. 504, 507, 5 A. 494; *Woodward v. French*, 31 Vt. 337, 344. Under our Practice Act the function of a demurrer is to test the sufficiency of a pleading in matters of substance only, and matters of form are left for the discretionary determination of the trial court. P. L. 1578; *Curtis Funeral Home, Inc., v. Smith Lumber Co., Inc.*, 114 Vt. 150, 153, 40 A. 2d 531.² In either view of the case no error appears.

The judgment overruling the demurrer is affirmed and the cause remanded.

HAMER v. PENNELL

Circuit Court of Appeals of the United States, Fifth Circuit, 1936.
86 F.2d 227.

HUTCHESON, CIRCUIT JUDGE. These suits on promissory notes executed to J. W. Hamer by Williams Holding Company by W. M. Hamer, its president, and W. M. Hamer jointly, went off on the pleadings. Each of the appeals raises the same questions. They will be disposed of together. The questions are: (1) Whether it was error to strike, as sham, appellant Hamer's pleas of no consideration. . . .

Hamer, by his pleas, set up that the notes were merely gratuities, executed without consideration and for the accommodation of the payee; that plaintiff was not the holder in due course or for value, of the notes, and had taken them with notice of all defenses. . . .

Hamer's pleas, alleging positively and specifically that the notes sued on had been executed as gratuities and without consideration being good on their face, affidavits impeaching their good faith were filed. Counter affidavits in support of the pleas

² For the report of this case, see *supra* p. 409.

having been filed, the court to determine as a matter of judicial cognizance whether the ostensible issue tendered was in reality a sham one, that is, whether there was an issue for the jury in truth as well as in form, tried the matter out on the affidavits. These consisted of the affidavits of W. M. Hamer, the maker, and of J. W. Hamer, the payee in the notes, each swearing to an exactly opposite effect; the maker, that there was no consideration for the notes, the payee, that there was. Supporting these affidavits are affidavits of others, and letters, statements, property descriptions, and a written memorandum purporting to be a settlement attached as exhibits to the various affidavits. Together they make up a record of nearly 150 printed pages.

Appellant insists that since his pleas definitely and precisely tendered the issues to be tried, and were sworn to, the truth of what they tendered could not be by the court inquired into upon affidavits, but only on a trial to a jury. He insists further that if they could be inquired into at all upon affidavits it could only be for the purpose of determining whether there was or would be any testimony supporting the issue, and not, as was done here, for the purpose of determining whether that testimony was or would be true. In short, he urges that through a proceeding ostensibly upon the pleadings, his case has been tried upon its merits by the court and he has been deprived of a trial by jury.

On his part appellee insists that this is to misapprehend and miscall what occurred. That there was no trial of the facts. There was a mere inquiry into whether there were or would be facts to be heard and a finding that there were none. That appellant has therefore not been deprived of a trial by jury, but has only been subjected to the proper consequences of filing sham pleas. In support of this position appellee relies greatly upon the written memorandum of settlement, claiming that appellant has been precluded by it and cut off from questioning the consideration of the notes. He insists that on the record before us both because the court had a right to strike the pleas as sham, and because if it did not have that right it is apparent that on another trial the result will be the same, the judgment should be affirmed.

We do not think so. Far fetched, fantastic, and difficult to credit as appellant's version of the signing of the notes does appear to us to be, we cannot declare it as matter of law, to be preposterous and unbelievable. The very extent of the proof, as well as the unusual, not to say bizarre character of some of the considerations appellant advances make it clear to us that this is not a case which should have been or may be disposed of on the

pleadings. It is a case to be tried on its merits; a case in which, under proper rulings on the evidence and proper instructions, appellant's fundamental claim that the notes, the settlement agreement, and all the papers which enter into, lie back of, and make them up were executed by him without antecedent obligation, and for no consideration, but merely from a sense of moral obligation should be tried.

It is perfectly true that everything in the record tends to support appellee rather than appellant. It is true, too, that the claim appellant makes seems to us in the nature of an after-thought when pressed on his promises. But he has a right to a trial by jury on whether he tells the truth, for if he does, no judgment should go against him.

Appellee seems to think that though appellant may question the consideration of the notes, he may not question the consideration for the purported settlement agreement. This will not do. According to appellant's tendered issues, the whole matter, settlement agreement and notes, were one transaction, put in that form to satisfy his brother, though they both knew and understood the facts, and that there was no legal consideration for either.

While, then, we agree with appellee that the practice approved in *Rhea v. Hackney*, 117 Fla. 62, 157 So. 190, is a proper practice in the federal court, and that the court had the power, on motion to strike, to test out within legal limits whether the pleas were sham, this power did not extend to deciding issues of fact arising on that motion.

"But a pleading cannot be stricken out as sham unless the falsity thereof clearly and indisputably appears. As otherwise expressed, to warrant the rejection of a pleading as sham, it must evidently be a mere pretense set up in bad faith and without color of fact. The rule cannot be applied to any case except where the defense is shown to be a plain fiction. And when a defendant, in defending against a plaintiff's motion to strike out his defense as sham, supports it by a special affidavit stating specifically the grounds of it, he cannot, as a general rule, be deprived of the benefit of a trial of his plea in the usual mode, as a case for striking out does not exist merely because the court may perceive but little prospect of the success of the alleged sham pleading." . . .

For the error of the court in striking appellant's pleas as sham, instead of permitting him to go to trial on them, the judgments are reversed and the causes are remanded for further and not inconsistent proceedings.

NEEFUS v. NEEFUS

Supreme Court of Minnesota, 1941. 209 Minn. 495, 296 N.W. 579.

PETERSON, JUSTICE. This is an action for breach of a defendant's redelivery bond in a replevin action. The sureties appeal from an order striking their answers as sham and frivolous.

In the replevin action plaintiff sued the defendant Ralph L. Neefus to recover possession of certain personal property. The latter was permitted to retain the physical custody of the property under a receipt which he gave the sheriff. Then he gave a redelivery bond with the defendants Hartwig and McCormick as sureties. The bond is in the penal sum of \$1,500 and is conditioned for the delivery of the replevied property to the plaintiff if a delivery was adjudged and to pay to plaintiff such sum as for any cause might be recovered against the defendant.

The plaintiff recovered a judgment in the replevin action in the alternative for the recovery of possession of the property or in case such possession could not be had for the sum of \$412.50 and for \$53.06 costs and disbursements. Execution was issued and returned showing a levy on part of the property on which \$17.50 was realized, from which \$5.70 additional costs were deducted as the costs of the execution. The judgment was satisfied to the extent of \$11.80. After the execution, there was \$453.76 due plaintiff on the judgment. For this sum she sues on the bond.

The sureties interposed identical answers alleging that their signatures were procured by the fraud of the plaintiff and her agents. The basis of this charge was that there was a false representation, that the only obligation under the bond was that the property should remain on the premises of the defendant in the replevin action and not be disposed of in any manner pending the action.

Plaintiff moved to strike the answers as sham and frivolous. In support of her motion, she filed an affidavit that the only person who was authorized to represent her in connection with the replevin action was her attorney, and that neither she nor her attorney had anything to do with procuring the redelivery bond.

In opposition, each of the defendants filed an affidavit. The defendant Neefus, who was also the defendant in the replevin action and the principal named in the redelivery bond, stated that he made the representation in question to the sureties. The defendant Hartwig stated in his affidavit that the defendant Neefus made the representation to him and admitted that he never had any dealings with the plaintiff or her attorney. He also stated that the other surety, McCormick, was present at the

time the representations were made. The defendant McCormick stated that the representations were made by the deputy sheriff who made the levy and by plaintiff's attorney. No attempt was made by McCormick to sustain his allegation that plaintiff had made such representation to him. He did not state the time, place, and circumstances of the representations alleged to have been made by the deputy sheriff or plaintiff's attorney.

Plaintiff filed counter affidavits of the deputy sheriff and her attorney, who stated that they had nothing to do with procuring the bond and that they did not know and had never seen the sureties thereon prior to its execution. The attorney said that he did not know and had never met nor seen the defendant Hartwig, and that the first time he ever saw the defendant McCormick was when he appeared as a witness for the defendant at the trial of the replevin action.

The defendants filed no counter affidavits.

1. A sham or frivolous answer may be stricken on motion and judgment rendered notwithstanding the same as for want of an answer. 2 Mason Minn. St. 1927, § 9259. An answer is frivolous which appears from a bare inspection to be lacking in legal sufficiency and which in any view of the facts pleaded does not present a defense. A sham answer is one which is sufficient on its face but which is false in fact. *Hasse v. Victoria Co-Op. Creamery Ass'n*, 208 Minn. 457, 294 N. W. 475.

The falsity of a pleading may be shown by affidavit. Where the falsity of the facts pleaded is established by a clear and unequivocal showing, the failure of the opposing parties to answer and contradict the showing must be taken as admitting its truth. Where the allegations of fact in a pleading are shown to be false the pleading should be stricken as sham. *Independent School Dist. v. City of White Bear Lake*, 208 Minn. 29, 292 N. W. 777.

2. The allegations in Hartwig's answer that the representations concerning the obligation of the redelivery bond were made by plaintiff and her agents were shown to be false by the admissions in his own affidavit. The case stood as to him as one where the principal in the bond had made a misrepresentation to induce him to sign it. The fraud of the principal in a bond inducing the surety to execute it is not a defense in an action by the obligee against the surety on the bond. *National Surety Co. v. Becklund*, 169 Minn. 177, 210 N. W. 882. See *Schlozer v. Heckeroth*, 174 Minn. 525, 219 N. W. 921.

Under the circumstances, Hartwig's answer presented no defense.

3. The allegation in McCormick's answer that he was induced to sign the bond by the false representation of the deputy sheriff and plaintiff's attorney was shown to be false. True, he made the bald and unsupported statement that they made the false representation. The deputy sheriff and the attorney denied that they made the representation and supported their denials by explicit statement of time, place, circumstance, and other facts surrounding the transaction which showed *prima facie*, at least, that McCormick's statement was false. Under the circumstances, it was incumbent on him to answer and contradict the showing. By failing to do so, he must be taken to have admitted its truth. *Independent School Dist. v. City of White Bear Lake*, 208 Minn. 29, 32, 292 N. W. 777. With the alleged representation by the deputy sheriff and the attorney out of the case, McCormick's case also stood as one where the principal in the bond had made misrepresentation to induce the surety to sign. His answer, therefore, did not state any defense for the same reasons that Hartwig's did not, and it should have been stricken for the same reasons.

Since it is not necessary to pass on the question whether or not the answers are also frivolous, we express no opinion with respect to that question.

Affirmed.

SECTION 3. THE PROCEDURAL REGULARITY OF THE STATEMENT OF FACTS

SOUTH CAROLINA CODE ANNOTATED 1942

§ 468. Counterclaim—Several Defenses. . . . The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.¹

NEW YORK CIVIL PRACTICE ACT

§ 241. Pleadings; What to Contain. (*Supra* p. 166.)

§ 262. Pleading Several Defenses or Counterclaims. A defendant may set forth in his answer as many defenses or coun-

¹ For identical statutory provisions, see Minn. Stat. § 544.06 (1945); Wash. Rev. Stat. Ann. § 273 (1932); Cal. Code Civ. Pro. Ann. § 441 (1946).

terclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable; provided that the court may in its discretion, whenever the interests of justice require, order a severance of the action or separate trials, or strike out the counterclaim without prejudice to the bringing of another action. Where defendant deems himself entitled to an affirmative judgment by reason of a counterclaim interposed by him he must demand the judgment in his answer.

Unless the answer is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

A partial defense may be set forth, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. Whether it is sufficient for that purpose presents a question of law, upon seasonable objection taken thereto. Matter tending only to mitigate or reduce damages is a partial defense, within the meaning of this section.

NEW YORK RULES OF CIVIL PRACTICE

Rule 90. Formal Requirements of Pleadings. Each separate cause of action, counterclaim or defense shall be separately stated and numbered, and shall be divided into paragraphs numbered consecutively, each as nearly as may be containing a separate allegation. The allegations contained in a separately numbered paragraph of one cause of action, counterclaim or defense may be incorporated as a whole in another cause of action, counterclaim or defense in the same pleading by reference without otherwise repeating them. Denials of facts alleged in the complaint or in an answer and denied by reply must not be repeated nor incorporated in a separate defense or counterclaim. Any fact once denied shall be deemed denied for all purposes of the pleading.

ILLINOIS PRACTICE ACT

§ 33. (Form of Pleadings.) (1) (*Supra* p. 325.)

(2) Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

(3) Pleadings shall be liberally construed with a view to doing substantial justice between the parties.

§ 43. (Separate Counts and Defenses.) (1) Parties may plead as many causes of action, counterclaims, defenses, and matters in reply or rejoinder as they may have, and each shall be separately designated and numbered.

(2) When a party is in doubt as to which of two or more statements of fact is true, he may state them in the alternative, or, when they appear in different counts or defenses (whether legal or equitable) he may state the counts or defenses which contain them in the alternative, and a bad alternative shall not affect a good one.

(3) All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first. An answer containing only defenses to the jurisdiction or in abatement shall not constitute an admission of the facts alleged in the plaintiff's complaint. . . .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading.

(b) Defenses: Form of Denials. (*Supra* p. 519.)

(e) Pleading to be Concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

STEPHEN, PLEADING

Williston's ed. 1895. * 230, * 233.

[I]t is of [the essence of pleas in confession and avoidance] (as the name itself imports) to *confess* the truth of the allegation which they propose to answer or avoid. It was formerly the practice in many cases to frame such pleas with a *formal* confession or admission in terms, using the introductory phrase of *true it is, that, &c.*, and then proceeding to plead in answer to the matter thus explicitly admitted. But this method is not required by the rules of pleading, and, with a view to brevity, is now generally abandoned. It is essential, however, that the confession, though not express, should be distinctly implied in or inferable from the matter of the pleading. . . . It is not necessary, however, that a pleading in confession and avoidance should admit the truth of the adverse statement absolutely and to all purposes. The extent and nature of the admission required is defined by the following rule—that *pleadings in confession and avoidance should give colour*. *Colour* is a term of the ancient rhetoricians, and was adopted at an early period into the language of pleading. It signifies an apparent or *prima facie* right; and the meaning of the rule that pleadings in confession and avoidance should give colour, is that they should confess the matter adversely alleged, to such an extent at least, as to admit some apparent right in the opposite party, which requires to be encountered and *avoided* by the allegation of new matter.

NOTES

(1) *Blood v. Adams*, 33 Vt. 52 (1860): Trespass for forcibly ejecting plaintiff from a railroad car. Defendant pleaded the general issue and four special pleas in justification. "All the defendant's special pleas begin with a traverse of all that is alleged in the declaration except the ejecting the plaintiff from the cars, and, as to that, set up a special justification, that the defendant was the conductor of a train, and that the plaintiff was in the cars without a ticket, and that being called upon by defendant to pay his fare, he refused. The facts stated in the pleas would seem to furnish the defendant a sufficient justification for a forcible expulsion of the plaintiff from the cars." But they violate the rule that the same plea may not both deny and justify the same charge, for they "go on to say: 'And the said defendant, then and there required of the plaintiff . . . that he . . . should then and there leave the said train of cars. . . . And thereupon the said plaintiff, did . . . in pursuance of said request . . . leave the said train of passenger cars, which is the same ejecting, &c.'" This language does not concede that defendant forcibly ejected plaintiff from the cars. "If the plaintiff left the cars voluntarily, though in obedience to an un-

founded and unwarrantable command of the defendant, we think he could not maintain trespass against him for an assault, and therefore that these pleas do not properly confess the fact they assume to justify."

(2) *Morgan & Rogers v. The Hawkeye Insurance Co.*, 37 Iowa 359 (1873): In an action upon a policy of fire insurance one count of defendant's answer alleged that there was other insurance on the property, contrary to the conditions of the policy; another, that the premium for the renewal of the policy was not paid; another, that the action was barred because not begun within the time fixed by the policy; and another, that without defendant's consent the building was used for purposes forbidden by the policy. *Held*, it was erroneous to sustain a demurrer to these counts on the ground that the liability of defendant, but for the matters alleged therein, was not admitted. While, "if new matter is pleaded in avoidance, there should be, in the same count, either directly or by implication, a confession that, but for such new matter, the action could be maintained," each of the counts demurred to clearly admit, by implication, that but for the defense therein pleaded the action could be maintained.¹

(3) The codes generally require that each cause of action and each defense shall be separately stated, and, for this purpose, a negative defense and an affirmative defense are regarded as distinct defenses.² For this reason and because of the vitality of the common law rule that a plea in confession and avoidance must give color, it is held, even in jurisdictions in which inconsistent defenses may be pleaded, that it is improper to incorporate a denial in the statement of an affirmative defense.³ If a defendant commits this solecism, the plaintiff may move that he be required separately to state his negative and affirmative defenses, but if the plaintiff does not so move, the defendant may find himself in the uncomfortable position of being taken to have admitted what he intended to deny.⁴ However, it was held in New York that a denial embodied in the statement of an affirmative defense might not be disregarded. Consequently, if the plaintiff wished by demurrer or motion to question the sufficiency in law of the affirmative defense, it was first necessary

¹ *Cf. Ledbetter v. Ledbetter*, 88 Mo. 60, 61-62 (1885): "Ordinarily, a statement of new facts showing a non-liability, impliedly at least admits a liability, but for such new facts. Hence, it is often said an answer setting up new matter by way of defence should confess and avoid the plaintiff's cause of action. . . . But the confession is not necessarily an absolute one. It need not be made in terms. It is often only implied from the nature of the defence, or assumed for the purpose of the particular defence. Bliss, Code Pleadings, sec. 341."

² For a discussion of these requirements, see Clark, Code Pleading, 457-465, 599-600 (2d ed. 1947).

³ See, e.g., *Martin v. Johnson*, 205 Iowa 786, 218 N.W. 472 (1928); *Greiner v. Hicks*, 231 Iowa 141, 300 N.W. 727 (1941); *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299 (1929); *Bulova v. E. L. Barnett, Inc.*, 193 App. Div. 161, 183 N. Y. S. 495 (1st Dep't 1920). *Cf. Armstrong v. Presslor*, — Ind. App. —, 69 N.E.2d 609 (1946).

⁴ *Cf. Greiner v. Hicks*, *supra*, at 145: "The rule of [*Martin v. Johnson*, *supra*] is that a denial is waived by the setting up of an affirmative defense in the same division of the answer."

for him to move to strike out the denial.⁵ This led to another eccentricity in the New York rules, which was nicely explained by Judge Learned Hand in *De St. Aubin v. Paul Guenther, Inc.*⁶ "A difficulty faces a pleader," he said, "when the opposite party has already incorporated a traverse of a possible plea in avoidance in his own pleading—'leapt before he came to the stile.' If he leaves unanswered such an assertion, though it is not really an allegation at all, he hazards its being taken as such; indeed, he might strike it out, for it has no proper place in the first pleading. However, being placed in this position through the fault of the first pleader, it surely serves to convenience if he be allowed to couple a traverse of this anticipatory traverse along with the plea which the anticipatory traverse has denied."⁷ The result is indeed amorphous, and racks the soul of a conscientious pleader, because strictly there is no place for a traverse in a plea at all,⁸ at least where the original pleading is not alternative or double. Courts do not, however, value so much as formerly their logical integrity, and, if the result be convenient, no harm is done."⁹ As the court pointed out in *Bulova v. E. L. Barnett, Inc.*,¹⁰ these anomalies in the New York law originated in the decision of the Court of Appeals in *Douglass v. Phenix Insurance Co.*, 138 N. Y. 209, 216, 33 N. E. 938 (1893), that an affirmative defense "is to be treated as a separate plea, and the defendant is not entitled to have the benefit of denials made in another part of the answer, unless repeated or incorporated by reference and made a part of the affirmative defense." The anomalies have been eliminated by the provision of Rule 90 of the Rules of Civil Practice (*supra* p. 651) that any fact once denied shall be deemed denied for all purposes of the pleading.¹¹

DERBY v. GALLUP

Supreme Court of Minnesota, 1860. 5 Minn. 119.

ATWATER, J. Gallup brought an action of trover, in the District Court of Ramsey County, against Derby & Day, for the taking and conversion of certain personal property, of which Plaintiff

⁵ So, in *Uggle v. Brokaw*, 77 App. Div. 310, 313, 79 N.Y.S. 244 (1st Dep't 1902), the court said: "Each of these defenses contains denials of material allegations of the complaint, and, while such denials might have been stricken out on motion if the plaintiff were aggrieved thereby . . . , yet so long as they thus remain a demurrer will not lie, even though the other matter pleaded does not constitute a defense."

⁶ 232 F. 411 (D.C.S.D.N.Y. 1916).

⁷ See *Pullen v. Seaboard Trading Co.*, 165 App. Div. 117, 150 N.Y.S. 719 (1st Dep't 1914), cited by Judge Hand at this point.

⁸ But see *Bulova v. E. L. Barnett, Inc.*, *supra* note 3.

⁹ *Cf. Bulova v. E. L. Barnett, Inc.*, *supra*, at 166: "[W]here there is an allegation of fact in the complaint which if admitted would defeat the defense, a specific denial of that fact in the separate defense is proper, and such a denial cannot be stricken out."

¹⁰ *Supra* note 3.

¹¹ See *Blackwell v. Columbia Trust Co.*, 199 App. Div. 759, 761, 192 N.Y.S. 226 (1st Dep't 1922). *Cf. Clark, op. cit. supra* p. 634, note 2, at 599: "Similar results follow under F. R. 8 (e), eliminating technical forms of pleading and allowing the defendant to plead alternatively or hypothetically, and to state all his defenses, regardless of consistency."

claimed ownership and possession. The complaint alleged the value of the property to be \$2,636, and that the Plaintiff had sustained special damage to the amount of one thousand dollars—asking judgment for value and damages.

The answer contained, first, a general and specific denial of each and every allegation in the complaint.

Second, for a further defence, the answer alleges, that the Defendants were creditors of one C. W. Griggs, and sued out a writ of attachment against him in the United States District Court. That by virtue of said writ, and under the direction of the Plaintiffs therein, the Marshal of the Court did, on the 15th of August, 1859, levy upon certain goods, and take the same into his possession, &c. That said goods were taken from his possession by the Plaintiff by force, and that, on the 18th of August, he levied on certain goods described in the answer, which takings are alleged to be the same as those charged in the complaint. There was a verdict for the Plaintiff, on which judgment was entered and motion made to set aside the same, which was denied. Defendants appeal from the order denying the motion, and judgment.

The first question presented, is as to the admissibility of the two separate defences set up in the answer. The Judge charged the jury that the taking was admitted by the pleadings, to which the Defendants excepted. If both defences can stand, it is evident the charge was erroneous, otherwise, it was correct.

These pleas are clearly inconsistent with each other.¹ Under the old system of pleading, cases may be found where analogous pleas have been sustained.² . . . The Code does not authorize such pleading, nor any fictitious pleading; and the decision of this question must depend upon the construction to be given to the provisions of the Code on the subject of pleading.

The authorities under the Code upon this point are conflicting. . . .

Referring then to the Code, we find that one of the most important changes effected by it, is the abolition of all fictitious pleading, and requiring facts to be stated, whether as constituting the cause of action, or ground of defence. In regard to the complaint the principle is stated in direct terms, the Plaintiff being required to state "the facts constituting the cause of action;" and, although the language in regard to the answer is not precisely the same, yet it is entirely clear that the intent of the Code

¹ If inconsistent, were they inconsistent in law or in fact? See *Caruso v. Brown*, *infra* p. 659.

² Cf. Clark, *Code Pleading*, 629 (2d ed. 1947): At common law "no requirement of consistency [of defenses] was enforced."

is to allow the Defendant to plead only the facts constituting his ground of defence.³ For it is not to be supposed that any advantage is to be given to the Defendant over the Plaintiff in pleading, and the answer is required to be verified whenever the complaint is. The paramount object of the change effected by the Code is, to require truth in pleading. If this could be completely attained, much of the cumbrous machinery of Courts could be dispensed with, jury trials would no longer be necessary, and nothing would be required save the application of principles of law to the facts stated.⁴ But if absolute truth in pleading be unattainable, Courts may at least prevent parties from spreading upon the record pleas which prove their own falsity, or from deriving advantage from such as are inconsistent with themselves. It is true the Code provides, that "the Defendant may set forth by answer as many defences as he shall have;" but this provision must be understood with the restriction that those defences must be true—that they must be such as the facts to be proved will sustain. The object of the provision is not to enable the Defendant to defeat the action at all hazards, but to afford him the opportunity of pleading such facts as actually exist, or can be proved, constituting a defence. To hold otherwise, would be in direct conflict with the manifest intent of this system of pleading, and lead to the most serious abuses.

In the case at bar, the Defendants have denied, in the first place, every allegation of the complaint, thus putting in issue both the right of property in the Plaintiff, and the taking of the goods by the Defendants. This plea, if true, constitutes a perfect defence to the action. The taking of the goods constituted the gist of the action, and from the nature of the case the Defendants must know whether the plea denying the taking was true or false. If true, no other defence was necessary, and even had another, or others existed, consistent with this, it would but have encumbered the record with useless issues to plead them, though in such case permissible.⁵

But the Defendants, in their second plea, expressly admit the taking the goods, alleging them to belong to one Griggs, and

³ Cf. Clark, *op. cit. supra*, at 629: "Under the codes . . . , usually by judicial decision only, the several defenses which the defendant might file were required to be consistent. This was developed from the rule that the code required the pleading of facts."

⁴ Do you agree that if pleaders were truthful there would in legal controversies be no issues of fact but only issues of law to be tried? If so, why? If not, why?

⁵ Cf. *Woost v. Herberger*, 204 Minn. 192, 193, 283 N.W. 121 (1938): "It is no proof of inconsistency that establishment of one of two defenses makes the other unnecessary. . . . Inconsistency comes in only when proof of one necessarily disproves the other . . . , and then the defenses must be inconsistent in fact."

justify the taking under process.⁶ The only part of this plea, inconsistent with the former, is that in relation to the taking of the property. The allegation that the property belonged to Griggs, and that in regard to the value, are not in conflict with the previous denials. But in regard to the taking, it is obviously impossible that both pleas should be true, and no process of legitimate reasoning can make them appear consistent. If the same weight is to be allowed to the admission, as to the denial of the taking, it leaves them equally balanced, or rather, the one would destroy the other, leaving the charge in the complaint undenied. But in fact, the admission of the taking is entitled to more weight than the denial, for it is a familiar rule of pleading, that each party's pleading is to be taken most strongly against himself, and most favorably to his adversary.⁷ And thus, I think, the plaintiff is entitled to the benefit of the admission of the taking, as the pleas stand, and that there is no necessity for a motion to strike out, or to compel the party to elect by which he will abide.

The reasoning by which, in the cases above cited, similar pleas have been sustained, is to my mind entirely unsatisfactory, and ignores the true principles of pleading, as established by the Code. The learned Justice (Shankland) who delivered the opinion in *Stiles v. Comstock*, [9 How. Pr. 48], has made an able plea for the Defendant, and showed, perhaps, that the principle there contended for was recognized under the old system, though his argument seems entirely to overlook the idea that truth is essential to a pleading under the Code. He supposes that the Plaintiff may *prove* a cause of action which never actually existed, and that the Defendant should be permitted to frame his plea to meet such supposable case, and also to deny the actual existence of the facts alleged. It is, perhaps, sufficient

⁶ Upon defendant's motion for reargument, which the court denied, Atwater, J., said (5 Minn. 141-142): "The admission of the taking of the goods, in a plea of justification, he [counsel for defendant] regards as wholly technical, and would only have that part of the plea which justifies the act regarded by the Court. This is a somewhat novel and ingenious attempt to avoid that provision of the Code which requires truth in pleading, but to my own mind wholly inconclusive and unsatisfactory . . . I cannot assent to the proposition . . . that the confession in a plea of justification was only technical, even under the old system of pleading, much less under the Code, but think it entitled to the same weight as the part in avoidance, and for reasons founded in the most evident principles of justice."

⁷ Upon the motion for reargument, Atwater, J., said that this reason for holding the admission entitled to more weight than the denial, was erroneous, and stated the correct reason as follows (5 Minn. 146-147): "The Code requires truth in pleading, and where the falsity of a plea appears on the face of the pleading, it will not be permitted to stand. Where an allegation of the complaint is not denied by the answer, it is, for the purposes of the action, to be taken as true, and where a Defendant has expressly admitted an allegation, we do not think that he can complain if credit is given to the admission, or rather more credit than to his denial, of the same allegation . . ."

to remark that general rules of pleading cannot be framed to meet these extreme and exceptional cases; and that, although a case might be supposed where a Defendant would suffer injury by the commission of perjury against him, the evil would be far greater to allow him to deny an actual fact, and yet to derive the same advantage from a plea admitting the existence of the fact. I cannot perceive on what principle this rule of pleading can obtain, unless it be held that the Code was designed to furnish the Defendant with the means of defeating his adversary, *per fas aut nefas*. . . .

The judgment below is affirmed.⁸

NOTES

(1) Georgia Code Annotated § 81-310 (1933): "No part of an answer shall be stricken out or rejected on account of being contradictory to another part of the same, but the court shall suffer the whole answer to remain, if the defendant should desire it, and avail himself of any advantage he can or may have under either or the whole of said answer, and proceed to trial accordingly." ⁹

(2) Massachusetts General Laws c. 231, § 90 (1932): "If a defendant answers two or more matters in his defense, no averment, confession or acknowledgment contained in one of them shall be used or taken as evidence against him on the trial of an issue joined on any other of them." ¹⁰

CARUSO v. BROWN

Court of Appeals of Kentucky, 1911. 142 Ky. 76, 133 S.W. 948.

Opinion of the Court by WM. ROGERS CLAY, COMMISSIONER—Affirming.

Appellant, Anthony Caruso, brought this action against appellee, John B. Brown, to recover on the following note:

"\$2,500.00. Cincinnati, Ohio, March 10th, 1908.

"On or before sixty days after date we promise to pay to the order of John B. Brown
Twenty-five Hundred and no 100 Dollars
payable at The Citizens National Bank of Danville, Ky.,
..... Value received with interest at 6 per cent.

"No. 1. Due

"Danville, Columbia & Scottsville Railroad Company.

"By J. F. Allen, President."

⁸ See Clark, *op. cit. supra*, at 629-632; Note, *Right to Plead Inconsistent Defenses*, 48 L.R.Q. 177 (1913); Millar, *Pleading under the Illinois Civil Practice Act*, 28 Ill. L. Rev. 460, 476 (1933); Blume, *A Rational Theory for Joinder of Causes of Action and Defenses*, 26 Mich. L. Rev. 1, 32 ff. (1927).

⁹ Cf. J. R. Watkins Co. v. Ellington, 70 Ga.App. 722, 29 S.E.2d 300 (1944): "It is well settled that a defendant may file inconsistent answers. . . . They may be used by the plaintiff as admissions against the defendant."

¹⁰ Cf. Herman v. Fine, 314 Mass. 67, 49 N.E.2d 597 (1943).

Said note was indorsed as follows:

"Cincinnati, O., Mch. 10th, 1908.

"For value received, I do hereby sell, transfer, and deliver the within note to Anthony Caruso and hereby guarantee the prompt payment of this note when due.

"John B. Brown,
"Liberty Township,
"Casey County, Ky."

After setting forth the execution of the note, the petition charged that appellee Brown had signed and transferred the note in question to appellant and had guaranteed the payment thereof. The petition concludes with an allegation to the effect that, after the maturity of the note, it was duly presented at the Citizens National Bank, of Danville, Kentucky, during banking hours, and payment thereof refused.

To the petition appellee filed an answer interposing several defenses. In the first paragraph he denied the allegations of the petition. In the second paragraph he charged that the obligation sued on was simply an obligation of the Danville, Columbia and Scottsville Railroad Company, and was known by appellant to be such, as well as accepted by him as such. Then follows an allegation that the note had been paid by the acceptance by appellant of certain shares of stock. Paragraph three contained a plea of fraud, and charged that by the fraud of appellant and his attorney, he was induced to indorse the note in the belief that he was acting in his official capacity as treasurer of the railroad company and it was necessary for him to indorse the note in order to bind that company; that he signed the note without knowing that he became bound in his individual capacity, and would not have signed it except for the fraud of appellant and his attorney. By paragraph four appellee pleaded that the sum of \$833.33-1/3 was paid on said note on or about March 24th, 1908, and that appellant accepted same in full discharge of any obligation he had against appellee. It will not be necessary to consider paragraph five, as a demurrer was sustained to it. Other pleadings were filed, completing the issues. The trial before a jury resulted in a verdict for appellee. From the judgment based thereon, this appeal is prosecuted.

The facts in brief are as follows: Appellee and a man by the name of Allen were incorporators of the Danville, Columbia and Scottsville Railroad Company. Money was needed for the purpose of building the railroad. Allen induced appellant to come to Danville and go from there over the proposed line of the railroad. Appellant was accompanied by his attorney. While in Danville a meeting of the board of directors of the railroad was

held, and the railroad was authorized to borrow the sum of \$2,500.00. Caruso and his attorney each claim that appellee agreed to be personally responsible for the loan, and that the loan would not have been made unless appellee had guaranteed the payment. A day or two later Brown went to Cincinnati with Allen, and the papers were fixed up in the office of the attorney. The papers were drawn in exact conformity to the agreement which appellee had made. Appellee claims, however, that he was induced to go to Cincinnati solely for the purpose of entering into an obligation that would bind the railroad company. When the papers were about to be drawn up, he stated that he did not understand the matter and started to withdraw, when he was informed by appellant's attorney that it would not be necessary for him to secure another attorney, but that he (appellant's attorney) would look after his interest. He signed the note in question without reading the same, and believing that he was signing it only in his official capacity as treasurer of the railroad company. He was induced to do so by the representations of appellant and his attorney, that he would not be personally bound.

The improbability of Caruso making the proposed loan to the railroad, which had no assets, without taking security of some kind, tends to support the testimony of him and his attorney, that there was no fraud of any kind practiced upon appellee. However, the question was one for the jury and was submitted in instructions which are not complained of, and, while the jury might properly have found for appellant, we can not say that its finding is flagrantly against the evidence.

Indeed, the only two grounds relied upon for reversal are (1) the failure of the court to require appellee to elect which of the defenses set out in his answer he would rely upon,¹ and (2) holding that appellee had the burden of proof.

Under the rule now in force, very great latitude is allowed a defendant in the number and character of defenses he may interpose to an action. For the purpose of determining whether defenses are inconsistent or not, the law divides them into two classes: First, those which are inconsistent and contradictory in point of fact; second, those which are merely technically inconsistent by implication of law. Where the defenses involve mere logical inconsistencies or inconsistencies by implication of law, they may be pleaded together; but defenses contradictory

¹ Cf. *Woost v. Herberger*, 204 Minn. 192, 193, 283 N.W. 121 (1938): If defendant's defenses were inconsistent, "the remedy would be by motion to compel an election rather than one to strike. Were the rule otherwise, plaintiff, rather than defendant, would have the election as between defenses."

or repugnant in fact can not be joined.² In other words, a defendant will only be required to elect between defenses where the facts stated in the pleadings are so inconsistent that if the truth of one defense be admitted it would disprove the other. (Smith v. Doherty, 109 Ky. 616, 60 S. W. 380; First National Bank v. Wisdom's Ex'or, 111 Ky. 135, 63 S. W. 461; Spencer v. Society of Shakers, 23 Ky. Law Rep. 854, 64 S. W. 468.) While it is true that appellee denied the execution of the note and the fact that he had obligated himself to pay it, it is perfectly apparent from that paragraph of the answer and the other paragraphs, that its purpose was merely to deny that he had indorsed the note and guaranteed its payment in his individual capacity. The traverse was a mere technical one, and must be considered in connection with the averments in the other paragraphs. Considered in this light, there is no conflict between paragraph one and paragraph two, for the latter simply charges that the note was as a matter of fact the note of the railroad company and not that of appellee; it is consistent, therefore, with the denial of facts contained in the first paragraph.

Nor is there any inconsistency between paragraph one and paragraph three. Paragraph three makes paragraph one a part thereof. Paragraph one, in effect, denies that the note sued on was appellee's individual obligation, while paragraph three makes plain why this allegation was made; that is, it shows that appellee indorsed the note upon the assurance that he was simply being bound in his official capacity. The effect of the two paragraphs, therefore, is to show that he was bound only in his official capacity, and not in his individual capacity.

There is no inconsistency in fact between paragraph two and paragraph four. Paragraph two contains really a plea of payment, while paragraph four attempts to make a plea of accord and satisfaction.

Our conclusion, then, is that where it is attempted to charge a person with liability on a note in his individual capacity, he may deny the execution of the note in that capacity and may also plead payment, fraud, and accord and satisfaction, and that none of these pleas would be so inconsistent in fact that the proof of one would tend to disprove the other.

The next contention concerns the propriety of the court's action in placing the burden of proof on appellee. For the purpose of determining this question, all the defenses must be con-

² Cf. Bache v. Bache, 33 Ariz. 45, 50, 262 P. 11 (1927): "[W]e hold that a general denial and a plea in confession and avoidance are not legally inconsistent, whatever they may be logically, and that the latter plea does not relieve the plaintiff of meeting the issues of the general denial."

sidered together. When thus considered, it is manifest that appellee's plea of non est factum was only technically true, that is, it contained a denial of the fact that he was bound in his individual capacity. Under these facts it was not necessary for appellant to prove that the indorsement was signed by appellee; that was admitted by the answer. Being admitted, appellee could escape liability only in the event that he proved payment, fraud, or accord and satisfaction. Following this view of the case, the court instructed the jury to find for appellant the amount of the note, subject to a credit of \$833.33 1-3 paid on March 20th, 1908, unless they believe from the evidence that appellant or his attorney, by fraudulent representations for the purpose of misleading appellee, and upon which he relied, thereby induced appellee to sign the indorsement on the note sued on under the belief that he was not obligating himself personally for the payment of said note, but only obligating the Danville, Columbia and Scottsville Railroad Company, or unless they believed from the evidence that the note was paid and satisfied by the issual of stock and payment of money as stated in the answer. This instruction properly submitted the issue to be tried. Had there been no evidence of payment, fraud, or accord and satisfaction, appellant would have been entitled to judgment on the pleadings. That being true, the burden of proof was properly placed upon appellee, and his attorney, therefore, had the right to make the concluding argument.

Finding no error in the record prejudicial to the substantial rights of appellant, it follows that the judgment must be affirmed; and it is so ordered.

NOTES

(1) Kentucky Codes, Civil Practice § 113 (4) (1938): "If . . . a party files a pleading which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall, upon or without motion, be required to elect which of them shall be stricken from his pleading. But a party may allege, alternatively, the existence of one or another fact, if he states that one of them is true, and that he does not know which of them is true."

(2) *Hart-Parr Company v. Keeth*, 62 Wash. 464, 467-468, 114 P. 169 (1911): Action to recover on a check and notes which, plaintiff alleged, defendant gave plaintiff in part payment for an engine. Defendant denied the allegations of the complaint and, by way of affirmative defense, alleged (1) that the check and notes were delivered upon the condition that they should not be effective unless the engine performed as plaintiff had represented that it would, and that the engine did not so perform, and (2) that by reason of plaintiff's breach of the contract of sale defendant had sustained damages which should be set off against plaintiff's claim. The court granted plaintiff's motion to re-

quire defendant to elect upon which one of his defenses he would stand and, after excepting to the ruling, defendant elected to stand upon his first affirmative defense. Judgment for plaintiff *affirmed*. (i) In *Seattle National Bank v. Carter*, [13 Wash. 281, 43 P. 331, 48 L. R. A. 177 (1895)],³ the court held that inconsistent defenses were not permissible and that a plaintiff "would not be compelled to establish the truth of an allegation in his complaint to which such defenses were set up, . . . and this doctrine has never been departed from by this court." (ii) "It is true that the doctrine should be applied with caution, and that not all seemingly inconsistent defenses are actually inconsistent; for it is sometimes necessary to make a denial which is in reality a denial of a conclusion of law instead of a fact. For instance, there may be a denial of delivery of certain property because, in the opinion of the pleader, the acts surrounding the circumstances do not constitute a legal delivery, and on that question he has a right to the holding of the court. The same rule applies to a denial of the execution of certain contracts, where it develops that the contract which defendant signed had afterwards been changed and the defendant denied its execution on the theory that in law it was not the contract which he signed; though in a case of this kind the answer is not logical under the provisions of the code, and it would be more in harmony with its spirit to simply state the facts under which the document in question was signed, and if the facts stated constitute a defense, of course the court will construe the answer to be a denial of the allegation of execution. But in all cases of this kind, and especially cases from this court, will be found the qualifying demand that there shall be no direct contradiction in the facts pleaded. . . . So that the crucial question in this case is, Were these affirmative defenses so inconsistent that the facts stated in one must necessarily be false if the facts stated in the other are accepted as true? If it is true that the notes and check were not executed or delivered under the contract set forth in the complaint, that there was no such contract entered into at all, but that, on the other hand, the contract was simply an agreement to try out the machine and to enter into a future contract if it proved satisfactory, which was, in substance, the first affirmative defense, together with the allegation that it did not prove satisfactory and did not meet the stipulated requirements, and that no contract was ever entered into, these facts are inconsistent with the statements made in the [second] affirmative defense,

³ In this case the court said (13 Wash. 286-287): "We think it legitimately follows . . . that if these inconsistent defenses are allowed to be pleaded, evidence under them cannot be excluded at the trial on the ground of the inconsistency. Then if they are inconsistent to the extent that if one of the averments in the answer is true the other must be false, and we follow the rule—as we must—that if it is a proper subject of allegation, it is a proper subject of proof, a court of justice is placed in the absurd position of listening to proof of a defendant tending to sustain one proposition, and in the next breath proving another proposition the facts of which are inconsistent with the one just testified to. . . . We take it that the only object of a law suit is the elicitation of truth, and that the only object of pleadings is to aid in determining the truth of the controversy. But the result of allowing pleadings to stand which are inconsistent to the extent of being untrue, would have exactly the opposite tendency, and courts would simply become machines to aid unconscionable litigants in avoiding their just responsibilities."

for it is not conceivable that there is any room for a counter-claim growing out of a contract which was never executed and to which the defendant was never a party."

(3) Davis, J., dissenting in *Granite State Bank v. Otis*, 53 Me. 133, 136-137 (1865): "But if *two or more* defences are specified, *only one of which can possibly be made*, for the reason that the *proof* of one will necessarily *disprove* the others, the plaintiff cannot tell which, if either, will be made. Thus, to allege in the specifications that a promissory note in suit was never executed, and also that it embraces usurious interest, and that it was given without consideration, will give the plaintiff no notice of the defence; for *all* cannot be proved; and he will be unable to determine which will be attempted. It may be said that a defendant cannot always tell beforehand which of two defences he can make. Such cases, though rare, may be possible. And so a defendant may not always be able to decide, in advance, whether he has any defence. But the statute requires specifications, nevertheless. And, if he is certain that he can defend on one ground or another, but he cannot tell which, and the two are inconsistent, he can elect which to specify; and if, at the trial, he finds that he is in error, he can obtain leave to amend. Cases are not infrequent in which defendants apply for leave to amend by specifying newly discovered grounds of defence. The power of the Court to allow amendments in specifications, as in pleadings, is sufficient to protect the rights of parties in exceptional cases, for which all loose rules of practice are always invoked."

(4) *Tighe v. Interstate Transit Lines*, 130 Neb. 5, 8, 9, 263 N. W. 483 (1935): Action for damages for personal injuries. "Defendant's answer set up a release signed and delivered by plaintiff. The reply sought avoidance of the release on two grounds: First, that it was secured by fraud and deceit of defendant; and, second, that it was 'obtained under a mutual mistake of fact' with respect to the extent and severity of plaintiff's injuries. *Held*, that the trial judge properly denied defendant's motion to require plaintiff to elect on which of these grounds she would seek to avoid the release. (i) "[T]he reply . . . is in the nature of a defense. The rule is that more than one defense may be interposed to the same cause of action provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other." (ii) "Whether two defenses are inconsistent depends upon the facts of each particular case, to which the test is to be applied, to determine whether the proof of one issue disproves the other. In the instant case the release was secured from plaintiff by a claim agent. He made representations as to the extent of her injuries and as to the likelihood of their permanency, based upon what he either believed to be the facts or, knowing better, fraudulently represented to be the facts. His representations were detailed to the jury in the evidence. Whether they were true or false and whether he believed his representations to be true or knew them to be false were all matters to be decided by the jury, in order for them to determine whether the release was executed under a mutual mistake of the parties or because of fraudulent representations of defendant for whom

the claim agent was acting and who was bound by what he said and did." (iii) "Assuming that the proofs are the same on the issue of mutual mistake as on fraud, that is to say, that the jury might conclude from the proofs either that plaintiff and defendant made an honest mutual mistake in respect of the release or that defendant made what amounted to legally fraudulent representations to secure that release, it would result in injustice if the jury reached a conclusion that had no allegation in plaintiff's petition to support that conclusion. To take the position that plaintiff must elect which issue she will use might result in just that situation. We refuse to do this."⁴

(5) *McAlpine v. Fidelity & Casualty Company of New York*, 134 Minn. 192, 200-201, 202, 158 N. W. 967 (1916): Action by a wife, as beneficiary, upon a policy insuring against the accidental death of her husband. Plaintiff alleged that her husband died from accidental means. Defendant alleged both that he killed himself and that his wife, the plaintiff, killed him. *Held*, the court properly overruled plaintiff's motion, made at the opening of the case, that defendant be required to elect on which of these defenses it would rely. (i) "Under our decisions separate defenses must be consistent. This is not an express requirement of the statute. It has come about by construction. It is not a universal holding, nor where held is the principle uniformly applied. . . . The objection on the ground of inconsistency is not favored. *Rees v. Storms*, 101 Minn. 381, 112 N. W. 419. . . . We are not so much concerned with the development of an artistic and symmetrical system of pleading as we are with having a practical procedure which will result in a speedy determination of disputes upon the facts." (ii) "It is sometimes said that whether both defenses can be true is the test of their consistency. An examination of the cases shows that whatever the test, defenses are not often held inconsistent. [Thus, in Minnesota it has been held to be consistent to deny a slander and to allege matter in mitigation; to deny the rendition of services and allege payment; and to deny the execution of a note and allege that it was procured by fraud.] Such defenses in general amount to a general denial coupled with a plea in confession and avoidance. There is an inconsistency in fact between

⁴ *Cf. Mutual Benefit Health and Accident Association v. Ferrell*, 42 Ariz. 477, 483-484, 27 P.2d 519 (1933): "Plaintiff alleged the execution of the policy and that he was entitled to certain benefits thereunder. Defendant answered, admitting the execution, but alleging that all claims of plaintiff had been settled and the policy canceled by a certain release. Plaintiff replied, admitting his execution of the release, but alleging (a) that he executed the same relying on the false representations of defendant's physician as to his condition, and (b) that he did not know at the time that the document he executed was a release and settlement, but believed, relying on the representations of defendant's agent, that it was simply a receipt for payment of the indemnity then admittedly due or to become due to defendant. It is obvious that these two allegations of the reply are utterly inconsistent. If we are to take (a) as representing the facts, plaintiff knew that he signed a release, but did so because of misrepresentations made to him as to his physical condition. If we are to take (b) as true, he did not know that he signed a release. It is, of course, true that plaintiff may plead inconsistent matters in confession and avoidance of an answer, but the burden is on him to sustain such pleas by affirmative evidence, and it is obvious that in this case the proof necessary to sustain (a) will negative (b), while the proof necessary to sustain (b) must negative (a)."

a general denial and a plea in confession and avoidance; but the inconsistency does not prevent the interposition of both. When the rule of consistency, technically applied, prevents the interposition of a fair defense, it must yield to the insistent demand of the law that a party be given a hearing on all his causes of action and all his defenses. This is the paramount consideration. Substantive rights must not be sacrificed to preserve a rule no more important and no better accredited than the consistency rule." (iii) "Naturally enough the legal mind revolts at a rule of pleading which requires a defendant to choose which of two honest defenses he will interpose, though both cannot be true, and neither is within his knowledge, at the peril of losing all if he mistakes, for when called upon to elect he is having his final day in court. We share the view of the trial court that the situation was not one requiring an election which it expressed as follows: 'It is true that the two defenses cannot both be true or correct; but it [is] also true that the defendants do not very well know which one may be correct; and either one would be a good defense if true. . . . It would be an injustice to limit them to one when they cannot know which one, if either, is true. They should have an opportunity some time to rely upon the other, and we cannot have two trials of the same matter. Therefore the motion to elect should . . . be denied.'" (iv) "It was not necessary for the defendant to allege suicide or that the death of the insured was caused by the beneficiary. Either could be proved under a general denial. Neither was an affirmative defense such as is a claim of misrepresentation or breach of warranty or suicide under a policy excepting it from the risk. The issue was upon the question whether Mr. McAlpine's death was caused by accidental means. The affirmative of this issue was upon the plaintiff. Any evidence negating accidental means as the cause was admissible."⁵

(6) *Berger v. Steiner*, 72 Cal. App. 2d 208, 164 P. 2d 559 (1945): Action against Perky and Steiner to foreclose a deed of trust on real property executed by Perky in favor of Steiner to secure a promissory note for \$10,000. Plaintiff alleged that Steiner assigned the note and deed of trust to him to secure a loan of \$3,000. "In [Steiner's] answer she specifically denied the allegation in the complaint that she assigned the note and deed of trust to [plaintiff]. In a separate special defense she alleged that no assignment was effectively made, but that she was induced by Roth [Perky's lawyer] to sign the assignments and that she received no consideration therefor and that any such transaction was void for lack of consideration. This was a permissible pleading of inconsistent defenses. The evidence shows that when the answer was verified and filed [Steiner] did not know what papers she had signed. She thought she had signed the assignments as suggested by Roth [that is, that she should assign the note and deed of trust to plaintiff, a friend of Roth, in order

⁵ This case is commented upon in 15 Mich. L. Rev. 152 (1916). See also 23 Minn. L. Rev. 840 (1939), commenting upon a later Minnesota case, and asking: "Would it not be desirable in Minnesota to abolish entirely the emasculated requirement of consistency in defenses and merely permit the parties to rely on the methods provided for when a knowingly false defense is interposed?"

to protect herself against possible attacks by Perky's relatives]. She did not ascertain as a certainty that she had not signed the documents [but that her signatures thereto were forged by Roth] until they were shown to her in court during the trial. Her pleading cannot be construed as an admission of the genuineness of her signature."

AYRES v. LUCAS

Appellate Court of Indiana, 1945. 116 Ind. App. 431, 63 N.E.2d 204.

Action by Arthur B. Ayres against Howard Lucas and another to enjoin defendants from interfering with plaintiff's removal of a pipeline laid under the surface of defendants' land. From an adverse judgment, plaintiff appeals.

DRAPER, JUDGE. . . . In 1898 one Carmichael, who then owned the land, conveyed to appellant's remote assignor "the right to lay, maintain, operate and remove a pipe-line" on the land in question. The line was laid shortly after the execution of the instrument, which was never recorded. In 1919 appellees contracted to purchase the land from Carmichael for a valuable consideration, and in 1920 they received title by warranty deed pursuant to the terms of the contract, took possession and have ever since retained it. Neither the purchase contract nor the deed referred in any way to the right of way grant.

The complaint is in two paragraphs, the theory of each being that although the right of way grant was not recorded, the appellees are nevertheless bound by it because they bought the land with knowledge that the pipe-line was located there, and because they knew, or in the exercise of due care should have known of the existence of the right of way grant.

In their answer to the first paragraph of complaint the appellees, in addition to several rhetorical paragraphs admitting or denying the allegations of the complaint, pleaded as a separate rhetorical paragraph, by way of "further and additional answer," title in themselves by adverse possession. In the first paragraph of their answer to the second paragraph of complaint the appellees denied the controverted allegations thereof, and filed a separate paragraph of answer, pleading that the appellant had abandoned the pipe-line. Their answer to the first paragraph of complaint was filed while the 1940 Revision of Rule 1-3¹ was in effect, their second while the 1943 Revision thereof was effective.

¹ For the first sentence of this Rule, see *supra* p. 20, note 1. The second sentence reads as follows: "New matter shall be confined to an affirmative paragraph or paragraphs of answer or reply and shall not be commingled with the statements that the pleader admits, denies or is without information."

The appellees offered no evidence to support their allegations of title by adverse possession or abandonment, and they do not rely upon either of those propositions here. Instead they rely entirely on the appellant's alleged failure to prove the allegations of his complaint, particularly with reference to knowledge on their part, actual or imputed. The appellant asserts, however, that these affirmative answers necessarily embrace an admission of knowledge, on the part of the appellees, of the location of the pipe-line, which admission must, as a matter of pleading, prevail over the pleaded denial of such knowledge.

Sec. 2-1006, Burns' 1933, Baldwin's 1934, Sec. 109, provides that a party may state in his answer, in separate paragraphs thereof, as many defenses as he may deem he has. Inconsistent defenses may be so pleaded, and admissions made in an affirmative paragraph of answer, pleaded along with denials of the allegations of the complaint pleaded in a different paragraph of answer, cannot be taken as admissions to relieve the plaintiff of the burden placed upon him by the denials. *Ray v. Moore*, Adm'r, 1900, 24 Ind. App. 480, 56 N.E. 937; *Graves v. Garard*, 1909, 44 Ind. App. 712, 90 N. E. 22; *Fudge v. Marquell*, 1905, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *Watson's Works*, Vol. I, § 580. Appellees' rhetorical paragraph of answer of title by adverse possession, though cast among other rhetorical paragraphs denying the allegations of the complaint, was a paragraph complete within itself and contained no denials of any facts alleged in the complaint. This method of pleading was not forbidden under the 1940 Revision of Rule 1-3, and affords no ground for relieving appellant from the burden of proving the denied allegations of his complaint. Neither does the separate paragraph pleading abandonment have that effect. . . .

Judgment affirmed.²

BYK v. WEBER

Supreme Court of New York, 1946. 186 Misc. 456, 60 N.Y.S.2d 426.

SHIENTAG, JUSTICE. This is a motion by the plaintiff in a slander action to strike out certain defenses as insufficient in

² Cf. Federal Rule 8(c) (2), *supra* p. 652. For a recent application of the part of the rule relating to inconsistent defenses, see *Fidelity & Deposit Co. of Maryland v. Krout*, 146 F.2d 531 (C.C.A. 2d 1945), and for a discussion of this part of the rule, see *Clark, op. cit. supra* p 656, note 2, at 631-632. Cf. *Iowa R. Civ. P.*, 72: ". . . . [T]he answer may contain as many defenses, legal or equitable, as the pleader may claim, which may be inconsistent. . . ."; *Mich. Ct. Rules*, 17, sec. 6: "Inconsistent causes of action or defenses are not objectionable, and when the party is in doubt as to which of two or more statements of fact is true, he may allege them in the alternative."

As to the joinder of inconsistent causes of action, see *Clark, op. cit.*, at 448-450.

law and certain paragraphs of a defense as unnecessary and prejudicial. The second and third separate defenses are good on their face and there is no reason for striking out any of the paragraphs of the second separate defense.

That leaves only one point, and one which raises an interesting question: The sufficiency in law of the first separate defense. The defendant in his answer denied uttering the words complained of as slanderous. In his first separate defense he says in effect that if the words ascribed to him were in fact uttered by him, they were true. Is this hypothetical form of pleading good, and if not, what is the remedy: to dismiss the defense as insufficient in law and grant leave to amend, or to strike out the hypothetical part of the pleading as unnecessary and redundant?

The law is well established that in an action for defamation, as in any other civil action, inconsistent defenses may be interposed. For example, one charged with defamation may deny the utterance complained of and in the same answer set up a separate defense of truth.¹ The defense of truth was regarded as one of confession and avoidance, but with the growth of liberality in pleading the confession has come to be treated as technical rather than real in character. Thus, in the situation here described the denial, taken in conjunction with the separate defense of justification, would today be interpreted in law to mean: "I did not utter the defamatory matter complained of, but if it is found by the triers of the facts that I did, then I assert that it was true." While there is no particular harm in allowing a defendant to plead that way, it is settled law that a contingent or hypothetical defense will not be allowed.

The question which has troubled the courts in the past and which has been the occasion of much learned discussion is whether a hypothetical defense is subject to demurrer (or to the later procedure of being stricken out in its entirety as insufficient in law), or whether the hypothetical clause in a defense should be stricken out as irrelevant or redundant and the defense, otherwise good, allowed to stand. In *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. S. 658, it was held—perhaps by way of dictum, but carefully considered dictum it was—that the proper remedy was not by way of demurrer, but by motion to strike out the objectionable hypothetical language. See also *Ugla v. Brokaw*, 77 App. Div. 310, 79 N. Y. S. 244; *Wiley v. Village of Rouse's Point*, 86

¹ Cf. *Cole v. Woodson*, 32 Kan. 272, 276, 4 P. 321 (1884): "The two defenses are not inconsistent. It may certainly be true that the defendant never used the language charged against him, and it may also be true that the language itself with all that it implies is true."

Hun 495, 33 N. Y. S. 773; cf. *Stroock Plush Co. v. Talcott*, 129 App. Div. 14, 113 N. Y. S. 214.

The first separate defense, as has been stated, is one of truth. The defense on its face would be good in the absence of the hypothetical clause, "if the words ascribed to defendant as alleged in plaintiff's complaint, were uttered by defendant." This hypothetical clause really has nothing to do with the separate defense of truth. It denies nothing; it adds nothing.² It may therefore be regarded as mere surplusage or as redundant matter which may properly be stricken out under Rule 103, Rules of Civil Practice.

It is hardly to be supposed that it makes much difference today what Rule of Civil Practice is invoked to deal with an objectionable hypothetical defense, whether it be Rule 109,³ under which a plaintiff may move to strike out a defense consisting of new matter on the ground that it is insufficient in law, or Rule 103,⁴ to strike out matter contained in any pleading on the ground that such matter is irrelevant, redundant or unnecessary. Generally speaking, it would be necessary, in such a situation, to resort to Rule 109 because the striking out of an objectionable hypothetical clause might distort the entire meaning of the separate defense sought to be asserted, or it might necessitate the reframing of the defense. Where, however, as here, the hypothetical language complained of may be excised and a perfectly good defense left remaining, the remedy afforded by Rule 103 would seem to be the appropriate one; the objectionable matter could be ordered stricken out and the answer deemed amended accordingly.

The motion is accordingly granted to the extent of striking out the hypothetical clause referred to where it appears in paragraph Twelfth of the answer, and the answer will be deemed amended accordingly. In all other respects the motion is denied. Settle order.⁵

NOTE

Peters v. Queen City Insurance Co., 63 Or. 382, 385-386, 387-388, 126 P. 1005 (1912): (i) "The denial of the execution and delivery of an instrument is inconsistent with a separate defense which admits the execution of the instrument, or which is founded upon the instrument being in existence and binding." (ii) "Counsel for defendant contend that the inconsistency of

² For a discussion of the propriety of pleading hypothetically or in the alternative see Clark, *Code Pleading*, 254-258 (2d ed. 1947); Hankin, *Alternative and Hypothetical Pleading*, 33 Yale L. J. 365 (1924).

³ For this rule, see *supra* p. 549.

⁴ For this rule, see *supra* p. 414.

⁵ Cf. *R. § L. Goldmuntz Sprl v. Fischer*, 57 N.Y.S.2d 489 (N. Y. Sup. Ct. 1945). See Fed. Rule 8 (e) (2), *supra* p. 652.

the defenses is removed by pleading the affirmative defenses with a qualification; that the defendant does not admit directly in the affirmative defenses that the policy was issued and is a binding contract, but only does so "if the plaintiff is in possession of the said policy." The effect of the qualification is the same as though the defendant had denied the execution of the policy on information and belief. It is well settled that a denial on information and belief of a party's own acts or the acts of a party's agent raises no issue, because a party is not allowed under the Code to deny on information and belief as to his own acts. A party to a contract is presumed to know whether the contract was entered into or not. He cannot say that he does not know whether it was made or not. He must either say that he did make it, or that he did not. *Heatherly v. Hadley*, 2 Or. 269, 273; *Knight v. Hamakar*, 40 Or. 424, 432 (67 P. 107). The court did not err in refusing to permit the defendant to occupy the position in which it could say that it did not make the contract, but that, if plaintiff should prove that it did, then there were provisions in the contract binding on plaintiff which were not complied with. We think that the trial court properly held the separate defenses to be an admission that the policy had been issued to plaintiff."

THE REQUIRED SPECIFICITY OF ALLEGATION

The rule that pleadings shall state material facts and not the evidence by which they are to be proved, is applicable to the statement of an affirmative defense as well as to the statement of a cause of action, and is applied in the same ways,¹ as the following cases indicate.

(1) *Universal Oil Products Company v. The Vickers Petroleum Company of Delaware*, 41 Del. 143, 16 A. 2d 795 (1940): Universal was the owner of a process for the cracking of petroleum tars and of certain letters patent relating to the process. It granted a license to Vickers to crack oil under these letters patent, in consideration of certain royalties to be paid monthly by Vickers. The declaration alleged that Vickers used the process but failed to pay the royalties due for certain periods. Vickers filed special pleas in each of which the defense was set up that the covenant sued on was illegal and unenforceable both by the common law and by the Sherman Act.² In each plea Vickers alleged that "the covenant sued upon was one which said plaintiff caused said defendant to enter into by virtue of and as part of a combination and conspiracy in restraint of trade and com-

¹ Cf. Clark, *Code Pleading*, 599 (2d ed. 1947): "When new matter is alleged, the general rules of pleading discussed in connection with the complaint will apply. As in the case of the complaint, the pleadings should be direct and unequivocal, and not confused or ambiguous."

² Act of July 2, 1890, C. 647, § 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690, Title VIII, 50 Stat. 693, 15 U.S.C.A., § 1.

merce among the several states, which said combination and conspiracy the said plaintiff and others had entered into prior to the date of the execution of said covenant and have been parties thereto at all times since." Universal filed a general demurrer to each plea. Demurrers *sustained*. (i) "The question attempted to be raised is whether the plaintiff, although it had unlawfully combined with others in restraint of trade, may yet enforce a contract entered into by it with a third person. The answer to the question depends, of course, on whether the contract sued on was only collateral to the illegal purpose of the unlawful combination and is not inherently illegal." (ii) Such questions "are often difficult of solution, dependent upon a variety of facts and circumstances; and the remarkable feature of the pleas demurred to is the absence of factual averment." (iii) "If these patent conclusions shall be accepted as proper averments of fact, it may be difficult to avoid the conclusion that the case is within the scope of the decision in *Continental Wall Paper Co. v. Louis Voight & Sons*, 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 486. But that case represents a narrow exception to the general rule that collateral contracts entered into by a monopoly . . . are enforceable; and such an important question clearly ought not to be decided blindly." (iv) "The first function . . . of written pleadings is, primarily, for the protection of parties, so that they may know what they will have to meet at the trial. The second purpose has a wider scope; for [the rules] also aid the court in the administration of justice by supplying facts so that it may be judged whether a cause of action, or a bar to an action, is disclosed, and that the field of inquiry may be limited to matters pertinent to the real issues." (v) "The pleas aver conclusions from facts not set forth. They disclose no defense. The real points in controversy are not ascertained and presented. There is nothing to guide the court at the trial of the case in the keeping of evidence within proper bounds."³

(2) *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F.2d 153, 156, 75 App. D. C. 235 (1942): Proceeding by the Commission to compel the Company to give the Commission access to certain of the Company's books. In Paragraph IX of its motion the Commission annexed to and made a part of its motion, as Exhibit F, a copy of an order by which it had directed its counsel to bring this proceeding. In Paragraph (d) of Exhibit F the Commission stated that its investigation showed that

³ See Note, *Pleading duress as a conclusion*, 119 A.L.R. 997 (1939). Cf. *Peavey v. Crawford*, 182 Ga. 782, 785-786, 187 S.E. 13, 107 A.L.R. 828 (1936), and see Note, *Form and particularity of allegations to raise issue of undue influence*, 107 A.L.R. 832 (1937).

the Company sold natural gas in Pennsylvania to an affiliated company which immediately transported it to New York and sold it there. By its answer the Company denied that it was a natural gas company within the meaning of the Natural Gas Act and alleged that it did not transport or sell natural gas in interstate commerce. *Held*: (i) By virtue of Rule 10 (c) of the Rules of Civil Procedure, which provides that a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes, the statements in Exhibit F were part of the allegations upon which the motion was based. (ii) The allegations in the Company's answer "are in the nature of legal conclusions, since they turn, or may turn, on the meaning of the legal terms 'natural-gas company' and 'interstate commerce.' They cannot be deemed denials of the statements of fact in Exhibit F."

(3) *Zebold v. Hurst*, 65 Okl. 248, 249-250, 166 P. 99 (1917): Action upon a promissory note in which plaintiff demurred to defendant's answer which alleged that the "note sued upon was without consideration." Judgment for plaintiff *reversed*. (i) A "majority of the states, and a greater majority of the Code states, hold that a general averment is sufficient in pleading want of consideration, without alleging or stating the facts.

. . . The cases cited by digests and text-writers in support of the contrary rule upon a close examination show that the question decided more often is the question of the failure of consideration, and are very often cited in support of the proposition that want of consideration must be pleaded. There is quite a distinction between want of consideration and failure of consideration. Want of consideration would often involve the single fact that nothing passed from the promisee or any one else to the promisor for the promise, while more frequently from its very nature failure of consideration would involve a chain or combination of facts and circumstances, the facts and circumstances to be stated in pleading failure of consideration."

(4) *Poole v. Poole*, 221 Iowa 1073, 265 N. W. 653 (1936): In contemplation of a divorce, a husband and wife entered into a contract whereby the husband agreed to pay the wife, in the event that they were divorced, \$250 a month. Subsequently, the husband secured a divorce on the ground of cruel treatment. This was an action by the wife for "unpaid installments" for a period of 27 months subsequent to the rendition of the divorce. Defendant answered, alleging that "prior to entering into the contract of settlement . . . , the plaintiff falsely . . . represented to the defendant . . . that she had at all times been faithful to him as his wife and had not been guilty of adul-

tery," but that such statements were false to the plaintiff's knowledge, were made by her to induce defendant to execute the contract of settlement, and that defendant believed and relied upon them. Plaintiff moved that defendant be required "to set out the specific acts of . . . adultery relied upon by him, together with the times and places of the commission thereof, and the names of the persons with whom they were committed, on the ground that the allegations are in the nature of conclusions, conceal the ultimate facts and fail to apprise plaintiff of the alleged wrongful acts with which she is charged. . . ." *Held*, the trial court should have granted plaintiff's motion. (i) "It is . . . the general rule in pleading fraud that the specific facts relied upon should be alleged," and the same rule applies to allegations of adultery. (ii) "It is a matter of common knowledge to bench and bar that many pleaders seek to confuse their antagonists by a system of 'blind' pleading which, without giving any definite information, yet contains a general allegation, which appears sufficient. Unless the trial court sustains a motion for more specific statement to such pleading, the defense must prepare to meet everything which could possibly be considered under the general allegation." (iii) "It is not sufficient to say that if certain accusations made at the trial are not true, they can be denied. [The plaintiff] has the right to know more specifically the acts with which she is to be confronted at the trial . . . , so that, if innocent, she may be prepared to meet the accusations. . . ."

(5) *United States Fidelity & Guaranty Co. v. Pierson*, 89 F. 2d 602 (C. C. A. 8th 1937): Plaintiff was injured while riding in Shrigley's automobile. Defendant had insured Shrigley against legal liability for damages arising out of bodily injuries sustained by any person, "caused by the . . . use" of his car. The policy contained a provision requiring Shrigley to "cooperate with the company" in effecting a settlement, and in the defense, of any action brought against him. Plaintiff first sued Shrigley and defendant defended the action in his behalf. In that action she obtained a judgment against Shrigley but execution was returned unsatisfied. This gave her the right, under the policy, to proceed against defendant, and so she instituted this action. Defendant's defense was that Shrigley did not cooperate with defendant in the defense of plaintiff's action against him but that, on the contrary, he went to great lengths to assist plaintiff to obtain a judgment against him. Defendant alleged, *inter alia*, that Shrigley's "conduct and demeanor before and during the trial [of plaintiff's action against him] was such that some members of the jury who tried the case urged the

[other] jurors" that Shrigley "wanted plaintiff to recover." *Held*, the trial court properly granted plaintiff's motion to strike this allegation from the answer. It "was one of two things, an allegation of wholly impertinent matter or an allegation of evidentiary matter. We shall assume that the conduct and demeanor of the assured before the state court jury which heard the plaintiff's case against him might be some evidence of collusion or lack of co-operation on the part of the assured. (Unless his conduct and demeanor was such evidence, the allegation was entirely irrelevant, since the policy contained no provision with reference to the conduct and demeanor of the assured at the trial.) But it was improper to plead that the assured's conduct and demeanor was such as caused the talk among the jurors and indicated lack of co-operation, since 'for the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings.' *McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. Ed. 615. The ultimate fact to be proven by the defendant in this case was that the assured failed to co-operate as required by his policy and as alleged in the answer. Any facts or circumstances tending to prove that ultimate fact were admissible in evidence without being pleaded. The defendant's answer stated just as good a defense after the allegation in question was stricken as before."

SECTION 4. THE PROCEDURAL CONSEQUENCES OF AFFIRMATIVE DEFENSES

A. The Creation of a Burden of Pleading ¹

IDAHO LAWS ANNOTATED 1943

5-617. Affirmative Relief — Cross-Complaint.—Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the attorneys of the parties who have appeared, who may demur or answer to the same within twenty days after such service as if it were an original complaint; and summons may be issued and served upon the parties to the action or proceeding who have not appeared.

¹ See Clark, Code Pleading, c. 11 (2d ed. 1947).

5-812. Uncontroverted Allegations of Complaint—New matter in answer.—Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party.²

NEW YORK CIVIL PRACTICE ACT

§ 266. Counterclaim Defined. A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and another person or persons alleged to be liable.³

§ 272. Contents of Reply. Where the answer contains a counterclaim, the plaintiff may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth new matter not inconsistent with the complaint constituting a defense to the counterclaim. A reply may contain two or more distinct avoidances of the same defense or counterclaim.

§ 274. Compelling Reply. Where an answer contains new matter constituting a defense by way of avoidance, the court, in its discretion, on the defendant's application, may direct the plaintiff to reply to the new matter. In that case the reply and the proceedings upon failure to reply are subject to the same rules as in the case of a counterclaim.

§ 242. Certain Facts to be Pled. (See *supra* p. 617.)

§ 243. Allegation Not Denied; When to Be Deemed True. Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply where a reply is required, must be taken as true for the purposes of the action. An allegation of new matter in the answer to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.⁴

² For other jurisdictions having similar statutes, see Clark, *op. cit.*, at 688 n. 4.

³ See Clark, Code Pleading, c. 10 (2d ed. 1947): "Counterclaims."

⁴ For other jurisdictions with similar statutes, see Clark, *op. cit. supra*, at 688 n. 5.

NEW YORK RULES OF CIVIL PRACTICE

Rule 104. Sham or Frivolous Answer or Reply. (See *supra* p. 562.)

Rule 111. Motion on Reply. After service of a reply, the defendant may serve notice of motion to strike out the reply, or a separate defense therein, on the ground that it is insufficient in law upon the face thereof.

A notice of motion specifying the objection herein set forth may be served at any time prior to trial.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 7. Pleading Allowed . . .

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such. . . . No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

MONTANA REVISED CODES ANNOTATED 1935.

9158. What Reply to Contain—Time for Filing. Where the answer contains a counterclaim, or any new matter, the plaintiff, if he does not demur, shall, within twenty days after service and filing of the answer, reply to such counterclaim or new matter, denying, generally or specifically, each allegation controverted by him, or of any knowledge or information thereof sufficient to form a belief, and he may allege, in ordinary or concise language, and without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such counterclaim or new matter in the answer.

9160. Failure to Reply. If the plaintiff fails to reply or demur to the counterclaim, the defendant shall be entitled to the same relief as a plaintiff upon the failure of defendant to demur or answer the complaint. If the answer contains new matter, and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice, for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment or order a reference or assessment for damages by jury, as the case may require.

9161. Demurrer to Reply. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defense or counterclaim, contained in the reply, on the ground that it is insufficient in law upon the face thereof.¹

BOARD OF EDUCATION v. WHISMAN

Supreme Court of South Dakota, 1930. 56 S.D. 472, 229 N.W. 522.

CAMPBELL, J. Plaintiff's amended complaint reads as follows:¹

To this complaint defendants interposed a demurrer upon the following grounds: . . .

"3. That the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants, or either of them."

The trial court duly made and entered its order sustaining said demurrer, from which order plaintiff has now appealed.

. . .

. . . That the complaint in this case does state a cause of action against the defendants is elementary. To state a good cause of action against a public officer, who is custodian of public money, and his bondsmen, for loss of the money, it is only necessary to allege the capacity of plaintiff, the qualification of the officer, the furnishing and acceptance of the bond and its conditions, the receipt of the money by the officer in his capacity as such at a proper time, demand for the money (if demand be necessary, which it usually is not), and failure to pay over or account. It is for defendant to plead and prove all items of discharge and bear the burden of explanation. 46 C. J. 1081, 1082; Lane, etc., District v. Endahl, 55 S. D. 73, 224 N. W. 951.

The real question here is whether or not appellant, in addition to pleading a good cause of action, has also pleaded a perfectly good defense thereto. The situation in this case moves us to reiterate the statement often found in the reports, that it is infinitely to be preferred that each party to an action permit the other party or parties thereto to do their own pleading. Generally speaking, it is usually much better for a pleader to content himself with pleading his *prima facie* case, or defense, whichever it may be, without more. The issues will be more definite, more clearly cut and precise, the burden of proof will be plain, and the case will be much easier of disposition and proceed in a

¹ For other jurisdictions with similar statutes, see Clark, *op. cit.*, at 689 n. 7.

¹ Amended complaint omitted.

more satisfactory fashion both in the trial court and upon appeal. To attempt in a complaint to embrace all the pleadings that may be desirable or requisite in a case, and to include therein, not only a complaint, but an answer by anticipation, and possibly a reply, is an entire perversion of the proper function of a plaintiff's initial pleading, and will generally result in difficulty and confusion.

Appellant herein has pleaded a number of facts in addition to those necessary to establish a *prima facie* case against the defendants. If such additional facts do not constitute a defense, they should be disregarded and treated as surplusage and the complaint held good. *Trotter v. M. R. F. Life Association*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. But, if such additional facts constitute a defense, even *prima facie*, and the complaint does not contain other averments which avoid such defense, then the complaint is bad.² Under our practice, a plaintiff need not reply to a defense set up in an answer unless a reply is required under section 2357, R. C. 1919.³ A complaint should state a *prima facie* cause of action. The answer (aside from matters of counterclaim, which are not here material, and are not considered or included in this discussion) should set up a defense by way of denial, or by way of new matter constituting a *prima facie* defense in the nature of confession and avoidance, or both. If the answer is denial only, the issues are thereby made. If the answer or any part of it is new matter, it is deemed controverted by the plaintiff "upon a direct denial or avoidance, as the case may require," without any reply or further pleading unless ordered. Section 2372, R. C. 1919.⁴ To an answer containing new matter sufficient to constitute a *prima facie*, or even an absolute, defense, a plaintiff therefore need not reply unless a reply is ordered pursuant to statute. His reply is interposed for him, whether denial or avoidance or both, by force of the statute. Nevertheless, if the complaint pleads facts which constitute even a *prima facie* defense, it must proceed further and

² Cf. *Penton v. Canning*, *supra* p. 179; *Jacobson v. Mutual Benefit Health & Accident Association*, *supra* p. 174.

³ This statute provided: "When the answer contains new matter constituting a counterclaim, the plaintiff may . . . reply to such new matter. . . . And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter . . ."

⁴ This statute provided: ". . . every material allegation of new matter in the answer constituting a counterclaim, not controverted by the reply, as prescribed in section 2357, shall for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party upon a direct denial or avoidance, as the case may require." S. D. Rev. Code §§ 2357 and 2372 (1919) have been superseded by S. D. Code §§ 33.0901 and 33.0906 (1930) which are similar to Fed. R. Civ. P., 7 (a) and 8 (d).

avoid them, else it is bad, notwithstanding the fact that, if the same matters of defense had been set up in an answer, they would be deemed denied or avoided by the plaintiff by force of the statute without further pleading. The general rule is so stated in 21 R. C. L. p. 492, and 31 Cyc. p. 110, and appears to be without exception. It is so held, not only in states such as Indiana and New Mexico, where a reply is required (section 381, Burns' Ann. Ind. Stat., Revision of 1926; N. Mex. Stat., Codification of 1915, § 4119), but also in states such as Georgia and Texas, where the allegations of an answer are deemed controverted without reply (Park's Ann. Code Ga. 1914, §§ 5647 and 5651; article 1829, Rev. Civ. Stat. Tex. 1911, Acts 1913 Tex. p. 256, § 3, Acts 1915 Tex. c. 101, § 3). [Citations omitted.] A complaint need contain nothing but a prima facie cause of action in favor of the plaintiff and against the defendant. It need not anticipate any defenses, but, if a plaintiff undertakes, by anticipating defenses, to make his complaint a vehicle for all the opposing contentions of all parties to the action, he must see to it that the complaint contains all of his own contentions, whether they relate to his prima facie cause of action (which is usually all his complaint ought to contain), or to his avoidance of the anticipated prima facie defense which he has pleaded for the defendant. . . .

We are therefore of the opinion that the complaint herein states a good cause of action against the defendants and also states facts sufficiently showing a prima facie, but not an absolute defense thereto, and fails to state anything in avoidance of that defense. The complaint is therefore bad. . . .

We are of the opinion that the order sustaining the demurrer should be affirmed. We do not know whether appellant contends that facts exist sufficient to avoid the prima facie defense stated in the complaint. If appellant believes that any such facts do exist, appellant ought not to be precluded by the determination of a mere question of pleading and burden of proof from its day in court on the merits. *Evans v. Hughes County*, 4 S. D. 33, 54 N. W. 1049. The order sustaining the demurrer is therefore affirmed, and the cause remanded, with leave to appellant, if it shall be so advised, to amend its complaint within sixty days after the remittitur is filed in the court below, upon payment of the costs of this appeal.⁶

⁶ Cf. *Personal Finance Co. of Providence v. Nichols*, 71 R.I. 213, 43 A.2d 315 (1945).

WILLIAMS v. JEFFERSON STANDARD LIFE INSURANCE COMPANY

Supreme Court of South Carolina, 1936. 181 S.C. 344, 187 S.E. 540.

FISHBURNE, JUSTICE. The plaintiff, as administrator of the estate of B. B. Williams, Sr., deceased, brought this action against the defendant, Jefferson Standard Life Insurance Company, to recover judgment in the sum of \$2,995, based on the issuance of an insurance policy on the life of Braxton Bragg Williams (who is the same person as B. B. Williams, Sr.). The policy bore date December 16, 1912, and was in the face amount of \$10,000. The insured died March 19, 1929.

On December 16, 1921, by agreement with the insurance company, the insured converted the policy into what is styled a paid-up contract in the face amount of \$2,375, payable at death of the insured. Under the terms and provisions of the policy he was thereupon relieved of the payment of further annual premiums thereon. The insurance was payable to the executors, administrators or assigns of the insured, and the amount claimed to be due by the plaintiff is the sum of \$2,375, with interest, aggregating the sum of \$2,995.

The defendant admitted the material allegations of the complaint, and set up as a bar to the plaintiff's action that in the month of November, 1926, the insured requested the defendant company to pay him the cash surrender value of the policy as of that date, and, in accordance with this request, the policy contract was duly surrendered to the defendant, and the insured acknowledged receipt and payment of such cash surrender value in the sum of \$1,606. By virtue of this payment the defendant denied all liability on the policy existing in favor of the plaintiff or any other person.

Upon the trial of the case, pursuant to notice, the defendant produced the original policy. The plaintiff introduced the policy in evidence, and rested his case upon it, and upon the admissions made in the pleadings.

During the trial, the plaintiff, over the objection of the defendant, sought to show by evidence drawn from defendant's first witness, that Mr. Williams, the insured, was an inmate of the state hospital for the insane at the time the policy was surrendered for its cash value, to wit, \$1,606, in the year 1926. The defendant company objected to the admission of this evidence, and all evidence going to prove mental incapacity of the insured at the time the policy was surrendered, upon the grounds: First, because the action at bar was not brought to set aside any transaction

between the defendant and the insured; and, second, because mental incapacity of the insured was not pleaded, and for this reason the defendant had no notice that evidence would be offered to prove it, and was therefore unprepared to make a proper defense on this issue.

After quite a lengthy colloquy which ensued between the court and counsel for the plaintiff and for the defendant, the objection to the evidence was sustained, and the plaintiff was not permitted to elicit or offer any testimony tending to prove mental incapacity, or to make any attack upon the validity of the release alleged to have been signed by the insured, on that ground. The trial court ruled that the defendant was entitled to formal notice by pleading of the specific ground on which the plaintiff intended to attack the validity of the release and settlement in order that it might have an opportunity to procure and introduce such evidence as it might wish, to support the integrity of the defense of payment.

Following his ruling, the circuit judge then permitted the defendant to call and examine one other witness for the purpose of proving its defense of payment and introducing into evidence the release signed by the insured, and the canceled check in the sum of \$1,606, showing his indorsement. The introduction of this evidence was allowed by the trial judge so that the defendant might be in a position on the record to make a motion for a directed verdict in its favor. The defendant made its motion for a directed verdict upon the ground that it had established its defense of payment, and had proved a complete release, and there being no evidence before the court to the contrary, a verdict in its behalf should be directed. Whereupon, the trial judge overruled the motion, withdrew the case from the jury, and sua sponte ordered a mistrial, in order that the plaintiff might, if he saw fit, amend his complaint or follow the suggestion of the court, and bring a suit in equity for the purpose of setting aside the release upon the ground of mental incapacity to contract. Both the plaintiff and the defendant company have appealed to this court from the rulings in the court below. . . .

We will first pass upon the errors assigned by the plaintiff.

The trial judge refused to allow the introduction of any evidence by the plaintiff impeaching the validity of the release in question on the ground that the case at bar was not a suit in equity to set aside the alleged settlement and release; and upon the further ground that such testimony was inadmissible unless responsive to a pleading alleging the mental incapacity of the insured whereby the defendant would be apprised of the issue to be met.

Obviously, it was the opinion of the trial judge that one or the other of these courses should be adopted, and for that reason the case was withdrawn from the jury, and a mistrial ordered for the reasons stated.

The position of the plaintiff is that no reply to the answer of the defendant was necessary under our code of procedure, unless the defendant had first obtained on motion an order of the court requiring a reply; and, further, that the release or settlement set up by the defendant could be attacked without such reply being made, and that under the pleadings—complaint and answer—he should be allowed to offer any competent testimony tending to prove that the insured was incapable of making a valid contract or agreement at the time the release was obtained and the settlement made, on account of his mental incapacity.

We entertain no doubt of the correctness of these contentions of the plaintiff.

Questions similar to these have been before this court upon more than one occasion, and decided adversely to the position now taken by the defendant company.

The Code provides that, when the answer contains new matter, constituting a counterclaim, the plaintiff may, within twenty days, reply to such new matter, denying, generally or specifically, each allegation controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer. Code 1932, § 471.

In the latter part of the same section of the Code it is provided that where the answer contains new matter, constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counterclaim.

Where the new matter, set up in the answer, does not constitute a counterclaim, no reply is necessary or allowable, except under an order of the court. It will thus be seen that the provisions of this section, requiring a reply to a defense by way of avoidance, was intended for the benefit of the defendant by giving him notice of the facts upon which the plaintiff relied. *Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689; *Rish v. Seaboard Air Line Railway*, 108 S. C. 30, 93 S. E. 250.

The prime purpose and object of pleading is to advise the parties of the issues they will be called upon to meet, and to give them opportunity to prepare for trial. *Shelton v. Southern Ry.*,

86 S. C. 98, 67 S. E. 899. A reply is a pleading, specifically provided for in the Code, and designed to accomplish this purpose, but the defendant made no motion requiring a reply to its defense of payment and release, and cannot now be heard to complain that it was taken by surprise, and without notice of facts which it might have obtained by pursuing the procedure outlined in the code.¹ . . .

In the present case the plaintiff states a cause of action at law for the recovery of money only, founded upon a contract of insurance. He ignored the settlement relied upon by the defendant, and not only was under no duty to make reply to the defendant's answer, but had no legal right to do so. [Citations omitted.] Under the holding in these cases it was not necessary for the plaintiff to anticipate any defense which the defendant might interpose, nor was it necessary for him to plead the insanity of the insured.

Unless the court in its discretion, upon motion, requires a reply, new matter set up in an answer by way of defense, not relating to a counterclaim, is deemed controverted by the adverse party without a reply. Code, § 488. Therefore, the allegations in the answer that the insured requested the defendant company to allow him to surrender his policy for its then cash surrender value, and that pursuant to said request the policy was duly surrendered and the cash surrender value paid, and that the insured acknowledged receipt and payment, were in direct issue.

Not only this, but the plaintiff had the right, under the settled practice of this state, to attack the validity of the release and settlement for fraud, mistake, duress, mental incapacity, or to prove any other matter in denial or avoidance of the new matter set up in the answer. [Citations omitted.]

The defendant contends that a contractual relationship existed between the insurance company and the insured, and for this reason this case does not come within the rule enunciated in that line of cases, wherein a plaintiff in an action at law is permitted to impeach the validity of a release set up by the defendant as a bar to recovery; as, for instance, tort cases.

We are unable to appreciate the force of this argument. It appears to be a distinction without a difference. The legal principle involved, and the rules of pleading and procedure which we have discussed, apply in either case.

¹ The court's discussion of two South Carolina cases so holding, is omitted.

It is our opinion that the trial court fell into error by refusing to allow the plaintiff to attack the release and settlement set up in the answer of the defendant.

The exceptions of the defendant company cannot be sustained. If the trial judge had directed a verdict in favor of the defendant, it would be our duty to set it aside, for the reasons already stated.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for a new trial.²

NOTES

(1) *Walker v. American Central Insurance Company*, 143 N. Y. 167, 38 N. E. 106 (1894): Action upon a fire insurance policy to recover for a loss which occurred on February 6, 1891. The complaint alleged that the policy was issued on February 1, 1891. Defendant's answer denied this allegation and "set up as a counterclaim that the policy in suit was issued by mistake; that it was in fact intended as a renewal of another policy issued by defendant on the same property expiring February 17, 1891, . . . but by mistake was made to take effect February 1, 1891, although it was not intended it should take effect until February 17, 1891." The answer demanded judgment that the complaint be dismissed and "that the policy in suit be so reformed that the risk mentioned in it should take effect February 17, 1891." No reply was served and upon the trial the court held that none was necessary because the matter set up as a counterclaim by defendant did not constitute a counterclaim. *Held*, the ruling of the trial court was correct. (i) "What is pleaded in the defendant's answer as a counterclaim, and asserted to have become conclusive because no reply was served, is, in our judgment, simply and only a defense. Facts pleaded which controvert the plaintiff's claim and serve merely to defeat it as a cause of action are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action, balancing in whole or in part that proved by the plaintiff. It meets the latter, not only by a denial of it, or an attack upon its existence, but by opposing to it an equal or over-balancing demand on the part of the defendant." (ii) "In this case what is averred to be an equitable counterclaim is in its legal effect an allegation that plaintiff's cause of action never in fact existed. . . . In brief, the answer denied the contract alleged, or any liability upon it. Of course, if true, that was a complete defense, and nothing but a defense, and could not be turned into an equitable counterclaim by asking a reformation of the writing," a remedy which defendant did not need and to which it was not entitled.³

(2) *O'Keefe v. Young & Rubicam, Inc.*, 257 App. Div. 141, 12 N. Y. S. 2d 31 (1st Dep't 1939): On defendant's motion plaintiff was ordered to reply to two affirmative defenses in

² Cf. *Glenn v. Rich*, 106 Utah 232, 147 P.2d 849 (1944).

³ Cf. *Schussler v. Richard*, 186 Misc. 963, 61 N.Y.S.2d 800 (1946).

its answer; and did so by pleading a general denial and three affirmative defenses designated as "affirmative replies." These did not "allege facts by way of avoidance but merely enlarge[d] upon the denials contained in the reply." Defendants appealed from an order denying their motion to strike out these defenses. Order reversed. (i) Only "new matter" may be set forth in a reply, and, "strictly speaking, if matter can be proved under a denial, it is not new matter." (ii) While there is liberality in this Department in permitting defendants to plead in their answers matter provable under a general denial, "we are not persuaded to permit such unnecessary new matter to remain in a reply," when, as here, the only purpose of pleading it is to make it the basis of an application for an examination of defendants before trial concerning matters upon which they will have the burden of proof. (iii) "The aim of the present practice [with respect to directing a plaintiff to reply to new matter in an answer], as regulated by statute, is to avoid delay, to limit the number of pleadings and to require that they be in such form as to enable the trial court readily to ascertain the issues to be tried. The legislative intent becomes obvious when we consider that the purpose of Section 274 of the Civil Practice Act was to afford a remedy to a defendant who might otherwise be embarrassed in going 'to trial well knowing that plaintiff might give evidence *in avoidance* of his defense and yet not know in advance the form which such possible attack might take.' Davis Confectionery Co., Inc., v. Rochester German Ins. Co., 141 App. Div. 909, 911, 126 N. Y. S. 723, 724. 'As a general rule when the new matter set forth in a plea in bar, is of such a character that if true it will constitute a complete defense to the action unless in some manner it is avoided, it will simplify the issue and prevent surprise at the trial if a reply is ordered showing the grounds of avoidance, if such exist.' 3 Carmody's New York Practice § 1018, p. 2161. [Citations omitted.] The allegations in the challenged affirmative defenses do not set forth matter in avoidance of the defenses contained in defendants' answer and they do not in any respect simplify the issues to be tried." Cf. Untermeyer, J., dissenting: "The reversion to this archaic principle [forbidding a pleader to plead affirmatively matter which may be established under a denial] is not supported by any consideration of substantial justice. Manifestly, it is not warranted by any thought of avoiding surprise at the trial, for it cannot be contended that the pleader, who could offer the proof under a denial, will surprise his adversary by setting forth in detail the nature of his contention in an affirmative defense. Nor is it justified upon the theory that the pleader gains some undue advantage by pretending to assume the burden of proof, for whenever that question has arisen the court has found no difficulty, and should find none here, in disregarding the state of the pleadings in determining where the burden lies."

DRAMIS v. DUNBAR

Supreme Court of Michigan, 1937. 280 Mich. 300, 273 N.W. 576.

Separate cases by Sophia Dramis and Frank Dramis against Ernest Dunbar for personal injuries received in a motor vehicle collision at a street intersection. Cases consolidated for trial and appeal. Directed verdicts and judgments for defendant. Plaintiffs appeal. Reversed and new trial granted.

FEAD, C. J. Plaintiff Frank Dramis, with his wife Sophia as a passenger in his car, drove east on Grand River avenue in Detroit at about 3:30 o'clock a.m. He approached Livernois avenue, which intersects Grand River, at a speed of 20 to 25 miles per hour, slowed down to 10 to 15 miles, and, when 40 to 50 feet from the intersection, looked to the left or north up Livernois avenue. Because of an obstruction he could see north on Livernois avenue only 30 to 40 feet beyond the north curb of Grand River avenue. He saw no cars approaching and saw no traffic going either way on Grand River avenue. He increased his speed to 18 to 20 miles per hour, did not again look to the left but, as he reached the intersection, looked right or south. When he got into the intersection his car was struck by a truck, with semi-trailer attached, driven by defendant from the north on Livernois avenue at a speed of 35 or more miles per hour. Neither driver saw the other before the collision.

Grand River avenue is a through highway 80 feet wide and cars coming into it on Livernois avenue are required to stop at the intersection. There are double street car tracks on Grand River avenue and a safety zone 70 to 80 feet long at the west of the intersection. Plaintiff Dramis was about at the middle of the safety zone when he looked to the left. The intersection was well lighted but the traffic light which operates in the daytime was not then working.

The court directed verdict for defendant on the ground that Dramis was guilty of contributory negligence. The cases were tried together and the issues were identical.¹

In addition to the state of the testimony, defendant's motion for directed verdict was based upon the pleadings. He invoked Court Rule No. 24 (1933).

"Section 1. New matter alleged in the answer filed in any action shall be answered by a reply in the same manner that allegations in the declaration or bill of complaint are required to be admitted or denied in the answer."

¹ In the part of the opinion omitted, the court held that the issue of contributory negligence should have been submitted to the jury.

In their declaration plaintiffs set up the claimed circumstances of the collision and averred that when they arrived at the intersection, Dramis looked to the right and left and, seeing no traffic in the immediate vicinity, he determined he was able to proceed in safety; and that defendant failed to stop at the intersection.

In his answers defendant alleged that at the time he entered the intersection plaintiffs were not in such close proximity to it as to endanger or interfere with defendant's progress and that defendant entered the intersection first.

Plaintiffs did not file a reply. Defendant's contention is that plaintiffs' failure to deny these allegations of his answers, by reply, resulted in their being admitted by plaintiffs under the rule and rendered Dramis guilty of contributory negligence as a matter of law.

Disregarding all objections to defendant's right to make the contention on motion to direct and passing the point of the legal effect of the claimed admissions, we hold the contention untenable.

The court rule was intended to simplify, not to complicate the practice, to define the issue, not to confuse it by requiring court and counsel to balance each allegation against each other allegation in the pleadings on apothecary's scales. The rule requires "new matter" to be answered, not every new allegation of fact. When a plaintiff sets up the circumstances of a transaction, defendant's statement of a different set of circumstances calls for no reply by plaintiff unless defendant's answer alleges facts which would defeat plaintiff's cause of action even though he proved all the allegations of his declaration. In substance, "new matter" means matter in avoidance of plaintiff's claim, not merely in contradiction of it. In this case the allegations in the declaration and answer are in direct contradiction of each other. Both cannot be true. They present a triable issue.

Reversed, with costs and new trial.²

CITY OF PINEVILLE v. ASHER

Court of Appeals of Kentucky, 1941. 287 Ky. 503, 154 S.W.2d 545.

Opinion of the Court by JUDGE CAMMACK—Reversing.

The appellee, Mrs. L. T. Asher, brought this action against the City of Pineville to recover damages for injuries which she

² Cf. *Shalla v. Shalla*, 237 Iowa 752, 23 N.W.2d 814 (1946); *Rallis v. Connecticut Fire Insurance Co.*, 46 N.M. 77, 120 P.2d 736 (1941); *Alwood v. Cahill*, 382 Ill. 511, 47 N.E.2d 698 (1943).

alleged she sustained when the heel of one of her shoes caught in a depression in a city sidewalk. She charged that the accident happened as a result of negligence on the part of the City and through no fault of her own. The City denied the allegations of the petition in the first paragraph of its answer and set up a plea of contributory negligence in the second paragraph. The plea of contributory negligence was not denied or controverted of record. The City's motions for a peremptory instruction at the conclusion of Mrs. Asher's evidence and at the conclusion of all the evidence were overruled. The trial resulted in a judgment for \$500 in favor of Mrs. Asher. This appeal is being prosecuted from that judgment.

The grounds urged for reversal are: (1) The trial court erred in overruling the City's motion for a peremptory instruction because the plea of contributory negligence was not denied or controverted of record; and (2) it was not actionable negligence on the part of the City to permit the depression to remain in the sidewalk.

Being of the opinion that reversible error was committed by the trial judge as complained of in ground one, it is unnecessary to discuss ground two and we reserve an expression of opinion thereon.¹ . . .

In the case of *Short v. Robinson*, [280 Ky. 707, 134 S. W. 2d 596], it was pointed out that, since the ruling in the case of *Louisville & Nashville R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179, 16 Ky. Law Rep. 14, ". . . it has been uniformly held that an undenied plea of contributory negligence will be taken as true, that a motion for a peremptory instruction should be sustained on that ground, and that the failure to controvert this plea will not be deemed to have been waived.² It does not matter that the defendant introduced evidence to show that the plaintiff was guilty of contributory negligence or that the jury was instructed on that point.³ [Citing cases.]" See also *Louisville & N. R. Co. v. Paynter*, 82 S. W. 412, 26 Ky. Law Rep. 761; *Newman's Pleading & Practice*, vol. 1, Third Edition, p. 654.

Judgment reversed with directions that it be set aside and for proceedings consistent with this opinion.

¹ The Court's discussion of *City of Jackson v. Moody*, 177 Ky. 844, 198 S.W. 233, cited by counsel for plaintiff, is omitted.

² The Kentucky statutes regulating the reply are similar to the Montana statutes, *supra*. See Ky. Codes, Civ. Prac. §§ 98, 126 (1938).

³ *Cf. Clark, op. cit. supra* p. 677, note 3, at 691: "If, however, the parties go to trial as though the matter were denied by a formal reply, it will then be held that the defendant has waived the requirement of a formal reply."

NOTES

(1) *Sherburne Mercantile Co. v. Bonds*, 115 Mont. 464, 145 P. 2d 827 (1944): "The affirmative allegations of the second amended answer, including the two affirmative defenses and the cross-complaint, were all placed in issue by the reply, which also set up three affirmative defenses directed to the entire answer. . . . Defendant filed a 'sur-reply' in which she denied the allegations of the first and second affirmative defenses of the reply but not of the third. However, that is immaterial, since 'an allegation . . . of new matter in a reply, is to be deemed controverted by the adverse party. Sec. 9178, Rev. Codes.'"

(2) *Kentucky Home Mutual Life Insurance Co. v. Watts* 304 Ky. 308, 200 S. W. 2d 732 (1947): "Appellant complains because the court sustained an objection to the filing of its rejoinder. Section 89 of the Civil Code of Practice limits pleadings to (1) petitions, answers and replies, and (2) demurrers. Section 98 of the Civil Code of Practice provides that all affirmative allegations in a reply shall stand traversed of record. Rejoinders are no longer permitted or necessary."

VONDERA v. CHAPMAN

Supreme Court of Missouri, 1944. 352 Mo. 1034, 180 S.W.2d 704.

CLARK, PRESIDING JUDGE. Appellant sued respondents for \$25,000 for injuries alleged to have been caused by a collision between the automobiles of appellant and respondents. Respondents answered by general denial and set up a release, executed by appellant nine days after the collision, in which appellant acknowledged the receipt of \$175 in full settlement for all injuries "not only now known injuries, losses and damages, but any future injuries, losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof."

Appellant by reply admitted the execution of the release, but alleged: that it was executed at a time when the only injuries of which appellant had knowledge or could have known by the exercise of ordinary care were superficial and slight; that such injuries were all that were known by respondents at the time the release was executed; that if respondents had knowledge or information of any additional injuries they did not communicate the same to appellant, but fraudulently withheld it from her; that appellant made the settlement in the honest belief that such injuries were all that she had sustained; that the amount of settlement was considered by her, and according to her best information and belief by the respondents, to be fair and

reasonable compensation for the injuries then known by the parties. The reply then alleges that shortly thereafter she discovered additional injuries, described in detail, of such nature that the amount of settlement would be grossly and shockingly inadequate to compensate her; that if she had known of such injuries she would not have settled for so small a sum, and that the settlement was made as a result of a mutual mistake on the part of appellant and respondents as to the existence of such serious and permanent injuries.

Demurrers to the reply were sustained. Appellant refused to plead further and this appeal is from the judgment entered in favor of respondents. Assuming, as we must in considering respondents' demurrer, that the allegations of appellant's reply are true, it is evident that she made a bad bargain in her contract of settlement. This court would be disposed to relieve her of the consequences of that bargain if we could find any valid legal reason for doing so. We have been unable to find such a reason in any of the cases cited by appellant. In many of them releases, or contracts of settlement, were set aside, but upon facts which differ materially from those in the instant case.¹ . . .

In the instant case there is no charge of fraud or unfair dealing. The time which elapsed between the accident and settlement would ordinarily be deemed sufficient to enable the injured person to determine the extent of her injuries with some degree of certainty. Appellant was not induced to settle by the assurance of a physician, by the efforts of a trained claim agent or even by the representations of the respondents. The appellant had a better opportunity to know her condition than did the respondents. The parties dealt at arm's length, in good faith, and the release expressly stated that it covered unknown damages which might later develop. There is no claim now that the release failed to express the intent which the parties had at the time of settlement. The only claim of mistake is that, although appellant settled for future damages, she did not know the extent of her injuries and, if she had, would not have settled for the amount paid her.

No doubt a slight taint of fraud or unfairness, coupled with a grossly inadequate consideration, will authorize the setting aside of a contract. There are cases where involuntary conveyances have been set aside for inadequacy of consideration alone, but we know of no case where a voluntary contract fairly made has been avoided solely for such reason. It is the policy of the law to encourage freedom of contract and the peaceful

¹ The court's discussion of these cases is omitted.

settlement of disputes. A person under no disability and under no compulsion may convey his property or relinquish his rights for as small consideration as he may decide. To hold otherwise, while it would relieve the instant appellant of the effects of a bad bargain, would establish a harmful precedent not only as to personal injury claims, but as to contracts in general. Such a policy would make it difficult to settle controversies respecting damages to person or property without resort to the courts.

In *Farrington v. Harlem Sav. Bank*, 280 N. Y. 1, 19 N. E. 2d 657, it is said: "No doubt the plaintiff had a perfect right to agree to settle for the injuries which were known and for all other injuries which might result, and such agreement would be binding upon him no matter how serious the result of the injuries might thereafter turn out to be, provided the agreement was fairly and knowingly made."

The principle announced in that case has, we think, been universally adhered to by the courts. [Citations omitted.] We find nothing to the contrary in any case cited by appellant.

On the record this case must be and is hereby affirmed.

All concur.

GOTHEINER v. LENIHAN

Supreme Court of New Jersey, 1942. 20 N. J. Misc. 119, 25 A.2d 430 (1942).

WILLIAM A. SMITH, S. C. C. This matter was submitted to the court on two motions, one by the plaintiffs and one by the defendant, and there are raised two general questions having to do with the application of the statute of limitations.

The action is brought to recover damages on account of an automobile accident which happened on September 17th, 1938, and of course that is the date on which the cause of action accrued. The suit was instituted on December 13th, 1940, more than two years after the accrual of the cause of action. . . .

The questions involved are first whether or not the statute of limitations is a bar to this action, and second, if it is, whether the defense of fraud and covin pleaded in reply to the answer setting up the statute of limitations, as charged by the plaintiffs against the defendant, postponed or extended the operation of the statute.¹ . . .

With regard to the second question raised, the defendant has moved that the allegations of the plaintiff's first separate reply to the first, second, third and fourth separate defenses, be

¹ The court's discussion of the first of these questions is omitted.

stricken on the ground that this amended reply is sham, as appears by the records of the court, and the records of the Essex County Circuit Court in an action instituted by the plaintiffs against the defendant herein and one Edward Holland; and on the further ground that the allegations of said amended reply are insufficient in law by the records of this court and the record of the Essex County Circuit Court.

This first separate reply charges that the delay in bringing this action was due solely to the fraud and covin of the defendant, his agent or servant; that such fraud was not constructive but actual fraud produced by affirmative acts on the part of the defendant, his agents or servants in and among other things, by false pretenses and false promise of settlement of the issue; that plaintiff was induced to postpone the placing of the claim in the hands of an attorney and instituting suit right up to the end of the two-year period within which plaintiff might have instituted a cause of action; and further charges that the relationship between the plaintiffs and the defendant was one of trust and confidence in the acts of the defendant of acknowledging the claim, making promises as recently as the end of the two years, that the case would be adjusted and suit would not be necessary; and the plaintiff's reliance upon said promises are all facts which prevent the bar of the statute of limitations from attaching herein.

The defendant produces the record which has been referred to in the action in the Essex County Circuit Court. It is an action covering the same cause of action as is here brought and it appears by said record that the action was instituted on the 16th day of September, 1940, which is one day previous to the expiration of two years from the date of the accident involved, namely, September 17th, 1938.

The argument made by the defendant is that the fraud, if it existed, was not relied upon by the plaintiffs, as they instituted their suit within the statutory period. In this I agree with them, and therefore it appears as a matter of record that the other action was instituted within the statutory period.

It may be questionable whether I at this time should make any order with regard to this separate reply to the defense of the statute of limitations. I think, however, under rule 40 and under rule 94, which gives the Circuit Court judges acting as Supreme Court Commissioners the right to make determinations regarding settlements at issue, that I may determine that the institution of the suit in the Essex Circuit Court within time by the plaintiffs against this defendant sufficiently establishes that

the fraud set up in this separate defense is not a bar, even if established at the trial, to the plea of the statute of limitations.

I think on settling the order this may be incorporated therein as a determination of this issue.

The application to strike out the plaintiffs' second separate reply to the first, second, third and fourth separate defenses will be denied.

ARMSTRONG v. BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY

Supreme Court of Montana, 1940. 110 Mont. 133, 99 P.2d 223.

ANGSTMAN, JUSTICE. Plaintiff has appealed from a judgment in favor of defendant after its motion for nonsuit was sustained. The action is for damages occasioned by the collision of defendant's train with plaintiff's automobile, driven by plaintiff at the time of the collision.

The complaint is grounded upon negligence on the part of defendant in running its train over the crossing without ringing a bell or blowing a whistle, and alleges that plaintiff in attempting to negotiate the crossing was proceeding "in a careful and prudent manner," and "with ordinary diligence and prudence." The answer may be termed a general denial coupled with an affirmative plea of contributory negligence on the part of plaintiff.

On the day of the commencement of the trial plaintiff filed a reply in which he expressly admitted that he "carelessly droye his automobile onto the crossing," and followed the admission with allegations based upon the last clear chance, or what is usually referred to as the humanitarian doctrine. Defendant demurred to the reply upon the ground that it is insufficient in law upon its face.

The motion for nonsuit was based upon several grounds, among them being that the complaint does not state facts sufficient to constitute a cause of action, and that there was no proof of negligence on the part of defendant. Under the circumstances here it is unnecessary to refer to the evidence, other than to say that no evidence went in without objection which can be said to have changed the issues as set out in the pleadings. In the face of the admission in the reply that plaintiff himself was guilty of contributory negligence in driving upon the crossing at the time of the collision, if he has any cause of action at all it is on the doctrine of the last clear chance. Whether he can recover on that theory may not properly be tried under the pleadings as they now stand. A judgment for plaintiff cannot be based upon

allegations which appear in the reply only. *Manuel v. Turner*, 36 Mont. 512, 93 P. 808. And a reply cannot add new grounds of relief to those alleged in the complaint. *McCarthy v. Employers' Fire Ins. Co.*, 97 Mont. 540, 37 P. 2d 579, 97 A. L. R. 292, and cases therein cited.

That the shifting from simple negligence relied upon in the complaint to the doctrine of the last clear chance in the reply constitutes an abandonment of the cause of action set out in the complaint and the assertion of a new cause of action in the reply has been definitely held by the supreme court of New Mexico in *Thayer v. Denver & R. G. R. Co.*, 21 N. M. 330, 154 P. 691. That case is well reasoned and amply sustained in principle by courts and textwriters, as a reading of the opinion will disclose. The supreme court of Missouri, by way of dictum, made the same assertion in *Daniel v. Pryor*, 227 S. W. 102, 105, as follows: "Even if the reply had set up the facts relating to the humanitarian rule, no such recovery could have been sustained under the second count, as the plaintiff's case must stand or fall under the allegations of said count."

Since plaintiff abandoned the right of recovery under the complaint by admitting in his reply that he was guilty of negligence in driving upon the crossing, and since he is precluded from setting up a cause of action in his reply, the court was right in sustaining the motion for nonsuit. There was no pleading upon which a verdict and judgment could have been entered in plaintiff's favor. . . .

Since, as before stated, the court properly granted the motion for nonsuit, the judgment is affirmed.¹

NOTES

(1) *The Savings & Loan Insurance Corporation v. Strangers' Rest Baptist Church*, 156 Kan. 205, 212, 131 P. 2d 654 (1942): "[I]f the reply abandons the cause of action first alleged and resorts to another whereby the foundation of the action is changed, such reply would be open to special demurrer, raising the legal question of a departure. But if the new matter in the reply is pleaded merely to meet the allegations of the answer, it will not constitute a departure unless it contradicts the facts stated in the petition, and if it is not adopted as a new basis of relief in place of the cause of action alleged in the petition. . . . In *Minter v. Shearer*, 117 Kan. 511, page 512, 232 P. 249, page 250, it was said: 'By the decision in *Hunter Milling Co. v. Allen*, [174 Kan. 679, 88 P. 252, 8 L. R. A., N. S., 291], the court intend-

¹ Cf. *Gerstel v. William Curry's Sons Co.*, 155 Fla. 471, 20 So.2d 802; *Morford v. California-Western States Life Insurance Co.*, 161 Or. 113, 88 P.2d 303 (1939); *Kolich v. Travelers Insurance Co.*, 154 Kan. 458, 119 P.2d 498 (1941); *Peterson v. Sevier Valley Canal Co.*, 100 Utah 516, 116 P.2d 578 (1941); *Ahlquist v. Mulvaney Realty Co.*, 116 Mont. 6, 152 P.2d 137 (1944).

ed to sweep away finical notions of departure which had previously prevailed, and to restrict application of what was left of the doctrine of departure to those instances in which actual prejudice might result from confusion of issues.'"

(2) *State ex rel. Barron v. District Court*, — Mont. —, 174 P.2d 809 (1946): Hart brought an action against Barron in the District Court for the purpose of quieting title to certain land. Barron's answer denied Hart's allegations with respect to the latter's title to the land and alleged that he was the owner and in possession of it. His answer also contained a cross-complaint seeking to quiet his title and to remove a cloud thereon, which, he alleged, Hart created by "wrongfully and maliciously" obtaining and recording a deed whereby one Winters purported to convey the land to Hart. Hart's reply to Barron's answer denied the allegations of the cross-complaint and "contained a pleading designated 'cross-complaint,'" in which Hart alleged that in 1940 Winters leased the land to Barron at the agreed rental of a certain proportion of the crops grown thereon; that Barron took and continued in possession of the land under the said lease; that in September, 1942, Winters conveyed the land to Hart and transferred to him the landlord's interest in the crops for the year 1942; that Hart duly notified Barron to that effect and demanded delivery of the landlord's share of the crops; but that Barron refused to deliver and converted the same to his own use to Hart's damage in a certain sum for which the "cross-complaint" demanded judgment. *Held*, the District Court should have granted Barron's motion to strike the "cross-complaint" from Hart's reply. "It seems clear that the plaintiff's so-called cross-complaint, included in his reply, is not a pleading permitted by statute, and is unwarranted under the provisions of section 9158. Its allegations do not constitute a defense to the new matter found in defendants' answer, and are not responsive thereto, but attempt to broaden the scope of the complaint by adding a new ground for relief. It seeks to become the basis of an entirely new claim for recovery. Such attempted pleading is bad and should have been stricken upon timely motion as was made in the trial court. It may be that the attempted cause of action might properly have been included in the original complaint, or its inclusion therein effected by amendment.² But it may not be properly included in the reply. If it were otherwise, it is difficult to perceive an end of the process of joining the issues in any cause."³

² Cf. Clark, *op. cit. supra* p 677, note 3, at 698-699.

³ Clark points out, *op. cit.*, at 696, that in some code jurisdictions counterclaims are permissible in a reply in answer to a counterclaim of the defendant and that "the Federal Rules not only allow a counterclaim in the reply, but may require it under the operation of the rule as to compulsory counterclaims, Rules 13, 18 (a); Commentary, Pleading Counterclaim in Reply, 1 Fed. Rules Serv. 661; *Warren v. Indian Refining Co.*, 30 F.Supp. 281, D.C.N.D. Ind., 1939; *Downey v. Palmer*, 114 F.2d 116, 118, C.C.A.2d, 1940; cf. S.C., 31 F.Supp. 83, D.C.S.D. N.Y., 1939."

To be reminded that replies are subject to the same formal requirements as complaints and answers, see, e.g., *Zuckerman v. Guthner*, 103 Colo. 276, 85 P.2d 727 (1938); *Continental Assurance Co. v. Hendrix*, 246 Ala. 451, 20 So.2d 851 (1945); *Hanson v. Fidelity Mutual Benefit Corporation*, 1 Terry 467, 13 A.2d 456 (Del. 1940).

B. The Creation of a Burden of Proof

MICHAEL & ADLER, THE TRIAL OF AN ISSUE OF FACT: I

Supra p. 596.

CELLA v. ROTH

Supra p. 605.

SEUFERT v. THE COMMERCIAL TRAVELERS MUTUAL
ACCIDENT ASSOCIATION OF AMERICA

Court of Appeals of New York, 1934. 263 N.Y. 496, 189 N.E. 563.

APPEAL from a judgment, entered July 27, 1933, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing, on the law, a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

HUBBS, J. Appellant was the holder of a membership certificate in the respondent membership corporation, which insured him against accidental injury. On June 22, 1931, he suffered an injury covered by the certificate of membership. He filed a claim as provided in the certificate. The respondent refused to pay the claim upon the ground that he had ceased to be a member prior to the date of his injury. The certificate provides for the levying of assessments against members for the purpose of paying losses and expenses. It provides that the mailing of a notice of assessment shall constitute notice thereof, and that upon failure to pay an assessment within forty-five days from the date of the notice, the membership shall terminate and the certificate be canceled without further notice.

In this action to recover upon the certificate, the complaint is in the usual form. The respondent, as a defense, alleged that an assessment was duly levied and was payable upon or before June 18, 1931, four days before the accident; that the assessment was not paid prior to the accident and that the certificate was terminated and canceled before appellant's injury was received.

Appellant established a *prima facie* case by introducing the certificate in evidence and with testimony showing the accident, the furnishing of notice and the failure to pay. The respondent concedes that appellant established a *prima facie* case. Respondent's evidence tends to establish that a notice of assessment

was duly mailed to appellant and that by failure to pay it, the certificate by its terms terminated on June 18th, before the accident. Appellant introduced evidence that the notice was never received. The only issue litigated was whether the notice was mailed.

The learned trial court charged the jury in effect that the defense upon that issue was an affirmative one and that the burden of proof on that defense rested upon the defendant and if the evidence which it believes was evenly balanced, the plaintiff was entitled to recover. Whether that charge constitutes reversible error is the only question for our determination.

Proof of payment of an assessment was not a part of the plaintiff's case. Payment was not due until after notice of assessment. Non-payment becomes a defense only after forty-five days from the date of mailing of the notice of assessment. The certificate was valid and in force until duly terminated according to its terms. It could not be terminated until a notice of assessment had been properly mailed and forty-five days had elapsed without payment of the assessment.

The defense was an affirmative one which arose after the certificate was issued and constituted no part of the plaintiff's complaint. (*Fischer v. Metropolitan Life Ins. Co.*, 167 N. Y. 178, 60 N. E. 431.) "The general rule of pleading, which also accords with reason, is that defenses which assume or admit the original cause of action alleged, but are based upon subsequent facts or transactions which go to qualify or defeat it, must be pleaded and proved by the defendant." (*Whitlatch v. Fidelity & Casualty Co.*, 149 N. Y. 45, 50, 43 N. E. 405.)

In actions against mutual benefit associations on certificates where the defense of failure to pay an assessment is pleaded, the burden of proof is on the defendant to establish such defense by a fair preponderance of the evidence. [Citations omitted.]

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.¹

BURDON v. WOOD

Circuit Court of Appeals of the United States, Seventh Circuit, 1944.
142 F.2d 303.

MINTON, CIRCUIT JUDGE. The plaintiff-appellee, as administratrix of the estate of her deceased husband, Robert Burdon, brought suit against the defendant-appellant, Clarence Wood,

¹ Cf. *Winans v. Attorney-General*, *supra* p. 610.

alleging that on September 23, 1942, the defendant had unlawfully shot and killed her husband. The defendant in his answer admitted killing the plaintiff's husband, but alleged that he acted in self-defense and that therefore the killing was not wrongful.

At the close of all of the evidence, the defendant moved for a directed verdict. The court took the motion under advisement.¹ The jury returned a verdict for the plaintiff, and the court rendered judgment on the verdict. The defendant then moved the court to set aside the verdict of the jury and the judgment and to enter judgment in accordance with the defendant's motion for a directed verdict and in the alternative for a new trial. Both motions were overruled. From judgment upon the verdict, the defendant has appealed. The only question presented is whether the court below erred in not directing a verdict or in not setting the verdict aside and sustaining the pending motion to direct a verdict.

Robert Burdon was a bartender employed at a roadhouse operated in Henderson County, Kentucky, by Dells, Inc., a corporation, of which the defendant was president and general manager. Burdon's working hours were from about 6:00 p.m. to 2:00 a.m. In this roadhouse was a bar thirty feet in length, which ran north and south across the east end of the room. The south end of the bar was open, and within about three feet of that end of the bar was a door in the east wall leading to an outside dance floor. In the same wall, about fifteen inches south of the first door, was a second door leading into the yard. Behind the bar, which was about three feet high, was a slat false floor laid about four inches above the regular floor. There was a water cooler on the bar in about the middle.

On the evening prior to the shooting, the defendant had visited three other taverns and roadhouses in the company of a friend and his wife. He testified that he had several drinks during the evening. He returned to the Dells property about 2:00 a.m. and went to bed in a trailer which was parked behind the roadhouse. He carried a gun in his pocket which he had taken out of his car and had on his person between four and five thousand dollars in cash. About seven-thirty o'clock the morning of September 23, 1942, the defendant, getting up to go to the toilet, heard an argument going on in loud tones in the barroom. He entered the barroom by the door which led in from the yard and found the decedent, who had remained drinking after finishing his work around 2:00 a.m., standing behind the bar near the

¹ See Fed. R. Civ. P., 50 (b).

south end arguing with Delbert Winchell, another employee, who was standing across the bar from him. Merl Wood, also an employee, was present. Sandefur, the day bartender, was behind the bar filling an icebox with cokes. The defendant passed behind the bar to go to the water cooler, and, as he passed Burdon, he admonished him and Winchell to quit arguing, saying they all had to get along together.

The defendant passed on to the water cooler, took a drink of water and returned past the decedent to the door where he had entered and here in a sharper tone told the decedent, who was trying to renew the argument, to quit arguing and go on home. The decedent retorted angrily that he did not have to take orders from anybody, that he would do as he "damned please," and that he would blow the defendant's "damned brains out." Thereupon, the decedent pulled his gun and fired a shot at the defendant, which missed. Instantly, the defendant pulled his gun and fired from the hip at the decedent. He was not as tall as the decedent and was standing on the regular floor, while the decedent was on the raised false floor. The defendant fired two shots, one of which hit the decedent in the upper lip below his nose and ranged upward, emerging at the back of his head one and one half inches below the crown, according to the physician who attended him. He fell behind the bar with his feet near its south end and slightly on his right side, with his gun lying at his finger tips. The decedent lay in a dying condition where he had fallen and no one did anything to or for him. The sheriff was summoned by Merl Wood at the instruction of the defendant, and after he arrived, he had his deputy call for an ambulance. The decedent was taken to a hospital in Henderson, Kentucky, where he died about an hour later. On his face were slight powder burns. The sheriff opened decedent's gun and found a discharged cartridge shell in one chamber. Upon smelling the barrel of the gun, he detected it had been fired recently. The sheriff, who had worked for the defendant two years before, did not lock him up but took him home with him and kept him there while the grand jury investigated the case. The grand jury exonerated the defendant.

There was no dispute as to any essential fact. No witness was impeached. There was some variance in the stories of the several witnesses on non-essential matters, but all agreed on the essential facts. All eyewitnesses testified that the decedent, with resentment toward the defendant and with a declaration that he would blow the defendant's "damned brains out," fired at the defendant, who then shot and killed the decedent.

Under this state of the evidence, should the court have sustained one or the other of the motions of the defendant for a directed verdict? Upon a showing that the defendant had shot and killed the decedent, a *prima facie* case of wrongful death was made out, and it then became the duty of the defendant to justify the killing. *Schlosser v. Griffith*, 125 Ind. 431, 25 N. E. 459; *Norris v. Casel*, 90 Ind. 143.

The defendant in his answer denied that his act was wilful, wrongful, grossly negligent, or without provocation, as alleged in the complaint. He alleged that he shot the decedent in self-defense. The law of self-defense is the same in Kentucky as in Indiana. [Citations omitted.] The law of self-defense applicable to the defense of one's person may be stated thus: If one is in a place where he has a right to be and is himself without fault, and he is assailed by another armed with a deadly weapon, he may repel force with force without retreating, even to the point of taking his assailant's life, if he believes and has reasonable cause to believe that he is in danger of losing his life or of suffering great bodily harm at the hands of his assailant.

The defendant, as president and general manager of the corporation which owned the Dells, had a right to be in the bar-room. His admonition to the decedent to cease quarreling and go home because the employees had to get along together, was not a wrongful act but was in keeping with his duty as manager. The only inference possible from the evidence is that the decedent, who had been drinking and quarreling, assaulted the defendant in anger with a deadly weapon. The defendant repelled the assault of the decedent without retreating, as he had a right to do.

We do not think that reasonable men could disagree with the proposition that the defendant had reason to believe that his life was in danger or that he was in danger of receiving great bodily harm at the hands of his assailant. No man could have stood in the shoes of the defendant in that awful moment without fearing death or great bodily harm at the hands of the decedent. When the defendant fired, he had a right to act upon the appearance of things which could not spell anything but great danger to his person. *Enlow v. State*, [154 Ind. 664, 57 N. E. 539]. Where the material evidence from the lips of unimpeached witnesses is non-conflicting and could lead honest, disinterested, and reasonable men to but one conclusion, there are no factual matters to be resolved which call for the intervention of a jury. Such facts await only a court to announce their effect in law. *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct.

391, 77 L. Ed. 819; *Troutman v. Mutual Life Ins. Co.*, 6 Cir., 125 F. 2d 769, 772, 773.

The plaintiff, to justify the submission of the case to the jury, has pointed out some conflicts in the evidence as to how far apart the defendant and the decedent had to be for the decedent to receive powder burns. There was no dispute that the burns were there and that the parties were close enough to make them. What difference does it make how far apart they were? Also, there was difference between witnesses as to where the bullet emerged from the decedent's head. Wherever it came out, its force was sufficient to kill the decedent. It would be natural for the bullet to range upward since the defendant was shorter than the decedent, shot from the hip, and stood on a floor four inches lower than that on which the decedent stood.

The plaintiff argued that there was evidence from which the jury could have found that a bullet discovered embedded in the door jamb, behind where the defendant had stood when the decedent shot at him, did not come from the decedent's gun because a bullet from his gun would not have made the kind of hole that this bullet left in the wall. From this it was argued that the decedent did not fire his gun at all, although all of the eyewitnesses had sworn that he did and lying beside his dying body was his gun with one empty shell in the chamber. Several witnesses testified that the gun smelled of having been recently fired. Even if it were admitted that the bullet found in the door jamb did not come from the decedent's gun, that is no proof that his gun was not fired. Taking the view of that circumstance strongest for the plaintiff, it is only negative proof that the bullet did not come from the decedent's gun. It is no evidence at all that his gun was not fired.

At the oral argument the plaintiff made some point of the fact that all of the eyewitnesses were employees of the corporation of which the defendant was president and general manager. Suppose they were. On no essential fact was there a conflict of evidence. Not one of the eyewitnesses was impeached on any material issue. Indeed, the plaintiff put the defendant and all except one of these eyewitnesses on the stand as her own witnesses. Why Sandefur was not called by the plaintiff does not appear. The plaintiff cannot challenge her own unimpeached witnesses. Certainly no factual situation authorizing a submission of the case to the jury is presented.

We think the court should have sustained the motion of the defendant for a directed verdict, and, having failed to do that, it should have sustained the motion of the defendant to set aside

the verdict and should have entered an order sustaining the defendant's motion for a directed verdict.

The judgment is reversed, with directions to the District Court to proceed in accordance with this opinion.

NOTE

Williams v. Metropolitan Life Insurance Co., 202 S. C. 384, 25 S. E. 2d 243 (1943): Action upon life insurance policies. Defendant admitted all of the material allegations of the complaint but alleged, by way of affirmative defense, that each of the policies provided that it should be voidable by defendant if within two years prior to the date of its issuance the insured was treated by a physician, unless it should be shown that such treatment was not for a serious disease or unless the fact of such treatment was disclosed by the written application for the policy or referred to in an endorsement on the policy itself; that within two years prior to the date of the issuance of the policies the insured was treated by a physician, but that it was not shown that such treatment was not for a serious disease and no reference to such treatment was endorsed on the policies. Upon the trial, defendant assumed the burden of proof and "moved for the right to open and reply, which motion was granted by the Court." Defendant then proved by a physician that within two years prior to the date of the issuance of the policies he had treated the insured for a disease which he described; and upon the conclusion of his testimony "both sides closed and each party moved for the direction of a verdict. The Court overruled the defendant's motion, and directed a verdict in favor of the plaintiff, upon the ground" that defendant had not introduced the policies in evidence and, therefore, had not established its affirmative defense. Judgment for plaintiff *affirmed*. (i) By Section 488, 1942 Code, the allegation of new matter in an answer, not relating to a counterclaim, is to be deemed controverted by the adverse party. "The alleged clause in the policies relied upon by the appellant to defeat recovery did not relate to a counterclaim, but constituted new matter, which under Section 488 must be taken as having been specifically denied by the plaintiff. This made an issue, and cast upon the defendant the burden of proving that the policies contained the provisions quoted, and that no reference as to medical treatment was endorsed upon the policies. This it failed to do; the policies were never placed in evidence." (ii) "The allegations of a pleading merely affirm propositions which are to be established by proof. It is a truism that allegation without proof is as unavailing as proof without allegation. Not only is it essential that every fact necessary to constitute a cause of action or defense be pleaded, but every such fact, if in issue, must be proved." (iii) "We are sensible of the hardship apparent in this case, but the judgment of the lower Court . . . must be affirmed, upon the ground that the defendant failed to prove its affirmative defense."¹

¹ Cf. *Lupton v. Day*, *supra* p. 600; *Hassett v. Curtis*, *supra* p. 603.

C. The Creation of a Privilege of Disproof**TURNER v. LITTLE**

Court of Appeals of Georgia, 1944. 70 Ga. App. 567, 28 S.E.2d 871.

SUTTON, PRESIDING JUDGE. William M. Little sued Thomas Turner, Jr., alleging that Turner was indebted to him in the sum of \$670, besides interest, on twenty-three promissory notes which were described in the plaintiff's petition. The defendant answered and denied the indebtedness and alleged that after he finished his preparatory education, the plaintiff, who was his great uncle, came to him and voluntarily told him that he desired to furnish him funds to assist him in financing the expense of a college education at the University of North Carolina; that if the defendant applied himself and graduated, the sums the plaintiff would advance would be an outright gift, but if the defendant failed to graduate, he should repay the amounts advanced, together with interest thereon at six per centum; that the defendant accepted the proposition of the plaintiff and it was agreed between them, that, as the plaintiff provided him with funds, he would give him notes for the amounts advanced, which were to be held by the plaintiff as pledges to secure the carrying out of the contract by the defendant under which agreement, the notes were not to become effective until and unless the defendant failed to pursue his studies to graduation; that the defendant entered the University of North Carolina under this agreement and continued his studies until he graduated therefrom with an A. B. degree; that thereafter he continued his studies in the law school until he was admitted to the bar, and thus fully performed the agreement he had made with the plaintiff; that the pledges in security were fulfilled and should have been returned to the defendant, but having confidence in the plaintiff, he neglected to have them returned; that all of the notes sued on were executed in accordance with the agreement, and the defendant having fully performed the agreement, the notes never became enforceable and no indebtedness existed thereon; that the defendant was born October 3, 1900, and accordingly all of said notes, except the last four, were executed by him while he was a minor and he had never ratified them, as he accepted the help offered by the plaintiff as a gift as it was intended by them that it should be accepted.

On the trial, the plaintiff introduced the notes in evidence, and testified, in substance, that he loaned the defendant money under an agreement whereby he was to loan the defendant up to \$30 a month; that all of the money advanced to the defendant

was loaned under this agreement and the notes sued on represented the money loaned; that the plaintiff was to repay this money, and that there was no understanding relative to non-payment of the notes, if the defendant graduated from the University of North Carolina.

The defendant testified, in substance, that after he finished his preparatory education, the plaintiff agreed that if he would attend the University of North Carolina and pursue his courses there to graduation, he would assist him with certain funds; that if he finished his courses and graduated, nothing was to be paid, but if he failed to graduate, then he was to repay the plaintiff the money advanced; that while he was attending the University of North Carolina, the plaintiff would mail him checks and enclose with the checks notes complete except as to his signature, and that he would sign the notes and return them to the plaintiff and cash the checks; that he completed most of his work for his A. B. degree in June 1922, and received his A. B. degree in 1923; that he finished a year in the law school that year and was admitted to the bar in 1924; that each of the notes except the last four, were executed under the agreement and he did not remember about the last four which were executed some time after the other notes; that the defendant was born October 3, 1900; that he received money for each of the notes; that the last note was dated April 20, 1922, and he received his college degree in June 1923.

After the submission of the evidence and argument of counsel, the court, as a portion of his charge, submitted two questions to the jury for determination, and this portion of the court's charge will be set out and dealt with later on in this decision. [The first question was, "Under the rules of law given you in charge do you find that the defendant Thomas Turner ratified the notes he signed before (sic) he became 21 years of age?" The second question was, "Do you find under the rules of law given you in charge in favor of the contention of Thomas Turner, Jr., that the sums of money advanced to him by the plaintiff and which are evidenced by the notes sued on, were to be a gift, provided he completed his course at the University of North Carolina and graduated from that institution?"] The jury found in favor of the plaintiff by answering the first question "yes" and the second question "no," and the court then had the finding of the jury put in form by directing the following verdict to be signed: "We, the jury, find in favor of the plaintiff in the principal amount of \$670, and the interest on said notes from the various dates thereof until this date at 6% per annum, said interest amounts to \$852.92, making a total amount of \$1552.92. This 13th day of

January, 1942. J. C. Slaughter, foreman." Judgment was entered on this verdict. The defendant filed a motion for a new trial, which was overruled by the court, and the exception here is to that judgment. . . .

Special grounds 1, 2, 3, 4, 9 and 10 of the motion assign error on the charge of the court to the effect that, if they found from the evidence that there was an agreement between the plaintiff and the defendant whereby the plaintiff was to furnish the defendant money each month to assist him in financing his college education, and they found that the notes sued on represented money so advanced by the plaintiff to the defendant, that the notes executed by the defendant during his minority would be unenforceable unless the defendant had ratified them after he became twenty-one years of age; that if the jury found that the plaintiff furnished money under this agreement during the minority of the defendant and continued to furnish additional sums after the defendant became twenty-one years of age, that the acceptance of such additional sums by the defendant after he became twenty-one years of age would be a ratification of the agreement as a whole and of the notes executed thereunder by the defendant to the plaintiff.

The defendant contends that the court erred in giving the above principles in charge because the action was brought upon the twenty-three notes and not upon the agreement, and upon the further ground that the agreement was not set out in the plaintiff's pleadings. There is no merit in these contentions. The plaintiff sued to recover the sum of \$670, besides interest, which he contended he had loaned the defendant as evidenced by the twenty-three notes described in the petition. The defendant did not deny receiving the money or executing the notes, but set out in his answer that the money was advanced and the notes executed under an agreement between him and the plaintiff whereby the notes were not to become effective if the defendant completed his college courses and graduated. The plaintiff in his evidence admitted that the money was advanced under an agreement between him and the defendant, but denied that the terms of the agreement were as contended by the defendant. The defendant pleaded the agreement in his answer, and both the plaintiff and the defendant testified as to its terms and conditions. Where affirmative defenses are pleaded by a defendant in his answer, unless a motion is made to the court and the court directs plaintiff to file a supplemental pleading, it is not necessary for the plaintiff to file any additional plea to deny the allegations of the defendant's answer or to avoid the affirmative defenses set out in such answer. Metropolitan Life Ins. Co. v

Hale, 47 Ga. App. 674, 171 S. E. 306, and cit. See Code, §§ 81-309, 81-311; Callan Court Co. v. Citizens, etc., Bank, 184 Ga. 87, 125(2), 190 S. E. 831. The court did not err in instructing the jury as to the contentions of the plaintiff and the defendant with respect to the agreement entered into between them, where the agreement was pleaded by the defendant in his answer, and testified to by both parties. . . .

The verdict was authorized by the evidence, no harmful error of law appears, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

WILLIAMS v. JEFFERSON STANDARD LIFE INSURANCE
COMPANY

Supra p. 682.

**D. The Transfer of the Right to Speak the First
and Last Words**

SECOND REPORT OF HER MAJESTY'S COMMISSIONERS
FOR INQUIRING INTO THE PROCESS, PRACTICE,
AND SYSTEM OF PLEADING IN THE SUPERIOR
COURTS OF COMMON LAW

1853. 8-10.

. . . By a natural and convenient rule, the party upon whom the burden of making out the affirmative lies,—that is, the party against whom, if no evidence were adduced on either side, the verdict would pass,—or his counsel, states the case to the jury, and then adduces evidence in support of it. Next, the opposite party, or his counsel, addresses the jury, and if he has evidence to bring forward, produces it; after which the counsel for the party, who commenced, has the right of replying generally on the whole case. It is obvious that this course of proceeding affords a great advantage to the party who begins. He has the first word and the last; the opportunity of producing the first impression, and of renewing it in the last stage of the cause.

He has also this further and, perhaps, still greater advantage: the counsel for the party who comes second has only the right of being once heard, and that, before his proofs have been produced. Now, it often happens that the evidence does not turn out as was anticipated: new facts are elicited on cross-examination, or witnesses whose testimony was supposed to be

unexceptionable are damaged by cross-examination: yet the case may not be the less a good one; the witnesses may not be in the main less entitled to credit, if an opportunity were afforded of explaining the bearings of the case, as really or apparently altered; but the counsel's mouth is closed, while his opponent, unchecked by the fear of a reply, takes advantage of every discrepancy between the statement and the proof, of every ground for assailing the character and veracity of the witnesses, and frequently produces an impression inconsistent with the true justice of the case, and which the observations of the judge, who is constrained to adopt a more measured tone, do not always succeed in removing. So great is the advantage of the reply felt to be in practice, that, generally, one great object of a counsel for a defendant is, if possible, to avoid calling witnesses, even though conscious that, otherwise, his witnesses would improve his case. The exercise of a sound discretion on this point is one of the most difficult parts of the duty of an advocate; and many verdicts are doubtless lost, on the one hand, by exposing the case to the danger of a reply, and, on the other, by the fear of it operating to the keeping back of evidence which might have been decisive with the jury.

It is obvious that if the second party does not produce evidence, the same state of things applies to him who begins. The position of the parties is reversed.

The inconvenience and injustice of this system has long been felt and complained of (as appears from the observations of the former Commissioners, in their Third Report, pp. 68, 69, and their suggestions, p. 88); but the practice has become the more grievous, since, by the recent alteration of the law, the parties to a suit have been made admissible, and consequently, in practice, necessary witnesses. The motives for attacking and reflecting upon the adverse party in the cause are so obvious that we cannot wonder that such a result should very frequently occur; and the injustice of leaving a plaintiff or defendant exposed, first, to a severe cross-examination, and then to hostile observations, without giving his counsel an opportunity of vindicating his conduct or character, has been very sensibly felt.

We think an alteration should be introduced into the practice: that the counsel for the second party should have the opportunity of addressing the jury twice; first, on opening his case and again at the close of his evidence; and that the counsel who begins, in the event of his opponent not announcing his intention to adduce evidence, should, in like manner have the opportunity of addressing the jury a second time at the close of his case.

It will perhaps be objected that this alteration would have the effect of increasing the length of the trial. We hope it would not do so materially. Conscious of having the right of a second speech, counsel would rarely do more than briefly open their case, and observations now made by way of anticipation would be spared. But even if a little extra time should be consumed, we think that such a consideration ought not to stand in the way of a change necessary to justice.

NEBRASKA REVISED STATUTES 1943

25-1107. Order of Trial. When the jury has been sworn the trial shall proceed in the following order unless the court for special reasons otherwise directs:

(1) The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it.

(2) The defendant must then briefly state his defense, and may briefly state the evidence he expects to offer in support of it.

(3) The party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence.

(4) The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.

(5) When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be refused or given by the court; which instructions shall be reduced to writing if either party requires it.

(6) The parties may then submit or argue the case to the jury. In argument, the party required first to produce his evidence shall have the opening and conclusion. If several defendants have separate defenses and appear by different counsel, the court shall arrange their relative order.

(7) The court may again charge the jury after the argument is concluded.¹

¹ For a similar statute, see Ohio Code Ann. § 11420-1 (1940).

UTAH CODE ANNOTATED 1943

104-24-14. Order of Trial—Instructions—Arguments.

When the jury has been sworn the trial must proceed in the following order, unless the judge for special reasons otherwise directs:² . . .

(5) When the court has instructed the jury, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument.

(6) If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.

KENTUCKY CODES, CIVIL PRACTICE 1938

§ 317. Order of Proceeding in Trial. When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise direct:¹ . . .

6. Order of Argument. The parties may then submit or argue the case to the jury. In the argument, the party having the burden of proof shall have the conclusion and the adverse party the opening. If there be more than one speech on either side, or if several defendants having separate defenses appear by different counsel, the court shall arrange the relative order of argument.

§ 525. Party Holding Affirmative Must Prove It. The party holding the affirmative of an issue must produce the evidence to prove it.

§ 526. Burden of Proof; Who Has. The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

TEXAS RULES OF PRACTICE AND PROCEDURE
IN CIVIL ACTIONS

Rule 266. Open and Close—Admission.—Except as provided in Rule 269 the plaintiff shall have the right to open and conclude

² Subdivisions (1) to (4), inclusive, of this statute are similar to the first four subdivisions of the Nebraska statute, *supra*.

¹ The first five subdivisions of this statute are similar to the first four subdivisions of the Nebraska statute, *supra*.

both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as he may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

Rule 269. Argument.—(a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, whether upon special issues or otherwise, shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

(b) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side. . . .

(e) Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court. . . .

JOHNSON v. MOORE

Supreme Court of Vermont, 1938. 109 Vt. 282, 196 A. 246.

POWERS, CHIEF JUSTICE. The defendant bought a used car of the plaintiff and gave his promissory note for the unpaid part of the purchase price. The car was not satisfactory to him, and he refused to pay the note. Suit was brought thereon and defended on the ground of false representations inducing the sale. A jury trial in Montpelier municipal court, Judge A. C. Theriault presiding, resulted in a verdict for the plaintiff for a sum somewhat smaller than the amount of the note. Judgment was rendered accordingly, and the defendant excepted. . . .

The defendant claimed the right to open and close the argument to the jury. The court ruled against him and he excepted.

Speaking broadly, the right contended for by the defendant belongs to the party holding the affirmative of the issue being tried. To determine how this rule applies to a given case, it is necessary to ascertain from the record the party against whom judgment would be rendered if no evidence was introduced by either party.¹ This depends upon the record as it stands when the trial begins. So if, as the pleadings stood when this trial began, judgment would have gone against the defendant if no evidence was introduced, the exception was well taken. But if, upon the supposition made, judgment would have gone for the defendant, the exception cannot be sustained. So, here, it all depends upon whether the general issue was in the case, so that it was necessary for the plaintiff to establish his note by proof sufficient to make a *prima facie* case. *Harvey v. Brouillette*, 61 Vt. 525, 528, 17 A. 722; *Farrington v. Jennison*, 67 Vt. 569, 572, 32 A. 641. The record shows that the return day of the writ was May 17, 1937; and that within five days thereafter the defendant filed an answer setting up fraud and deceit in the sale of the car for which the note was given. But he neither admitted nor denied the allegations of the complaint. The answer having been filed within the municipal court rule, neither the provision of P. L. 1574, subd. 2, nor rule III of the municipal courts, regarding the general denial being treated as pleaded, applies. So it must be taken that the general issue was not in the case, and the special defense, alone, was involved. The defendant was entitled to open and close. But it does not follow that a reversal is required. For it is not enough, now, that an exceptor shows error.

¹ Cf. *Cowen v. T. J. Stewart Lumber Co.*, 177 Okl. 266, 58 P.2d 573 (1936); *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 137 S.W.2d 379 (1939).

He must in order to secure a reversal, go further and show affirmatively that he was prejudiced thereby. [Citations omitted.]

Prejudice is not made to appear, and the exception avails the defendant nothing.² . . .

Judgment affirmed.³

NOTES

(1) *Flaherty v. Wunsch*, 28 N. Y. S. 2d 178 (Sup. Ct. 1941): Action to recover damages for personal injuries in which defendant denied plaintiff's allegations of negligence and interposed the affirmative defense that plaintiff had released him from all liability. Defendant secured an order for the separate trial of the issues raised by this defense, and upon the trial of these issues was accorded the right to open and close. "On a separate trial of the issues relating to the release the merits of the whole case are ignored. The trial is limited solely to the issues raised by the answer and the larger questions of negligence are kept in the background. To hold the merits of the case in abeyance is, indeed, the whole purpose of the separate trial. The complaint, therefore, must be put out of view and only the answer and reply considered. So considered, it is clear that the burden of establishing the release lay on the defendant. The answer alleged that the plaintiff on December 13, 1937, released the defendant from all liability. The reply denied this allegation and alleged that on that day the plaintiff was incompetent. On these pleadings the defendant necessarily had to prove the making of the release and this obligation carried with it the privilege of opening and closing the case on the issues created by the release. On the questions of negligence the plaintiff, it is true, would have the burden of proof and the right to open and close. But the separate trial was concerned only with the limited issues of the release which the defendant had the burden of establishing."

(2) *Braddock v. Pacific Woodmen Life Association*, 89 Utah 75, 54 P. 2d 1189 (1936): Action by the beneficiary of a certificate of fraternal benefit insurance issued by defendant on the life of plaintiff's father. "Defendant denied liability on the ground that certain statements made by the assured in his application for insurance . . . were untrue, thereby voiding the policy." "The only evidence introduced by plaintiff was the benefit certificate, the execution and existence of which had been admitted by the defendant." Upon appeal from a judgment for plaintiff defendant contended that the trial court erred in denying defendant the right to open and close, which it had demanded at the trial on the ground that it had the burden of proof on all of the issues presented to the jury, but the court *rejected* this contention, *saying*: "It is a general rule, in the absence of statute,

² Cf. *Farmers Bank of Trenton v. Ray & Son*, 148 S.W.2d 120 (Mo. App. 1941): "The denial of [the right to open and close the argument] in a close case such as this record presents cannot . . . be said to be harmless error."

³ Cf. *Williams v. Metropolitan Life Insurance Co.*, *supra* p. 704; *Bennington State Bank v. Petersen*, 114 Neb. 420, 207 N.W. 673 (1926); *Home Insurance Co. of New York v. Johnson*, 226 Ky. 594, 11 S.W.2d 415 (1928); *Massie's Ex'x v. Massie's Ex'x*, 288 Ky. 370, 156 S.W.2d 195 (1941).

that a party holding the affirmative of the issues has the right to open and close the argument." But "the meaning of the statute [Utah Code Ann. 104-24-14 (5) (1943), *supra*] is quite clear, that, unless for special reasons the trial court in its discretion otherwise directs, the plaintiff is entitled to open and close the argument to the jury. The fact that a defendant holds the affirmative of the issues is a sufficient 'special reason' for the trial court to vary the statutory rule. It would have been entirely proper and in accordance with justice for the trial court to have permitted the defendant to open and close the argument in this case. The matter being within discretion, it was not error for the court to refuse defendant's request."⁴

(3) *Blackburn v. Beverly*, 272 Ky. 346, 114 S. W. 2d 98 (1938): "It appears from the record that after plaintiff had introduced his proof first, without objection, and after the instructions had been given by the court, counsel for appellant moved the court to be allowed the closing argument, on the ground that the burden of proof was on defendants. The motion was overruled, and it is now complained that this ruling constitutes reversible error. There appears several reasons why this complaint is not meritorious. The appellant made no objection to the manner of introduction of proof; his motion came after the close of the introduction of all proof. The burden of proof should be fixed at the beginning of the trial, from the pleadings, and when so fixed should not be changed during the course of the trial. . . . The rule is that the whole case must be looked to, and the party who has the burden on the whole case must carry the burden . . . , and such party is entitled to the closing argument, where his rights be properly preserved. . . . There were three separate answers filed in this case presenting three distinct defenses; one by the store, admitting the execution, pleading that the holder of the note should have presented it for pro rata payment upon the store's dissolution; another by the officers, who claimed nonliability because they signed only for the purpose of binding the store. The other by those whose names appeared on the back of the note, and desired its reformation so as to put them in the same class with the chief officers. Thus it will be perceived that there appeared a mixed situation as to the burden in this case. We have held that where several defendants filed separate answers, and the

⁴ Cf. *Lamarand v. National Life & Accident Insurance Co.*, 58 Ohio App. 415, 16 N.E.2d 701 (1937), in which the trial court denied defendant's motion to allow it to present its evidence first and to open and close the testimony and argument, although it had by its answer admitted all of the essential allegations of the petition, and in which the court on appeal said: "In the state of the pleadings the defendant had the right to open and close, unless the court, for special reasons, directed otherwise. The court having directed otherwise, are we permitted to inquire into the reasons for so doing or the discretion so exercised? It appears that from an early date, the courts of Ohio have held that a reviewing court may not do so, at least unless prejudice affirmatively appears to have resulted. We cannot say that prejudice resulted from the error complained of. The defendant had an opportunity and apparently did introduce all the evidence it had to offer, and did present its argument to the jury. There is no occasion to say that the result might have been different had this been done in different order." Cf. also *Kayser v. Accidental Life Insurance Co. of California*, 234 Iowa 310, 12 N. W. 2d 582 (1944).

burden as to one would be on plaintiff, and as to the other on the defendant, the placing of the burden is in the sound discretion of the court." [Citations omitted.]

KAPPA FROCKS, INC., v. ALAN FABRICS CORPORATION

Appellate Division of the Supreme Court of New York, 1942.
263 App. Div. 326, 32 N.Y.S.2d 985.

COHN, J. Appellant Kappa Frocks, Inc., hereinafter referred to as "Kappa," appeals from so much of an order of consolidation of two actions as grants to respondent Alan Fabrics Corporation, hereinafter referred to as "Alan," the right to open and close upon the trial of the consolidated action.

The privilege of opening and closing a case before the jury is a substantial and important right given to the party having the affirmative of the first issue of fact raised by the pleadings, and an appeal may be taken as of course from an order denying such a right. (*Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759; *L. O. N. Bank v. Judson*, 122 id. 278, 25 N. E. 367; *Van Devort v. K. & H. Evaporating Co., Inc.*, 252 App. Div. 8, 297 N. Y. S. 277; 4 Carmody's New York Practice, § 1302; Civ. Prac. Act, § 609.)

The consolidated action here, in essence, is one for goods sold and delivered by respondent Alan to appellant Kappa for an agreed price. Kappa's answer denies acceptance by it of the goods and the agreed and reasonable value thereof, and sets up a counterclaim for damages for breach of warranty. Obviously, respondent Alan, the seller, has the affirmative of the issue as to acceptance and the value of the goods and under ordinary circumstances would be entitled to open and close. Has it lost that right by reason of the fact that appellant Kappa began its action for breach of warranty on September 15, 1941, by service of a summons alone a few hours before respondent Alan had served upon Kappa a summons and verified complaint? Alan served and caused to be filed a note of issue in its action and immediately moved for and obtained a preference on the Trial Term Calendar. In all this time appellant Kappa made no attempt to file a note of issue or to have its action placed upon the calendar.

This court has stated that in the absence of exceptional situations the right to open and close is given to the party who first brings his action. (*Lee v. Schmeltzer*, 229 App. Div. 206, 207, 242 N. Y. S. 34; *Goldey v. Bierman*, 201 id. 527, 529, 194 N. Y. S. 373.) However, the rule of priority of action does not control in all cases. "The mere fact that one party wins a race to see who can commence an action first, where there are conflicting

rights arising out of the same transaction, does not necessarily mean that his right to open and close, if his action is consolidated with another brought by the other party, is so real and important that it cannot be taken away from him." (*Brink's Express Co., Inc., v. Burns*, 230 App. Div. 559, 562, 245 N. Y. S. 649, 653. See, also, *Van Devort v. K. & H. Evaporating Co., Inc., supra.*)

Adhering to substance rather than to form in the case before us, it would appear that priority of action is in reality with Alan. (*Dexter Sulphite Pulp & Paper Co. v. Hearst*, 206 App. Div. 101, 106, 107, 200 N. Y. S. 413.) In the circumstances, to allow the benefit of priority of action to Kappa because of its few hours of advantage in the service of the summons would be inequitable and unjust. In our view the Special Term correctly disposed of the matter by according to respondent the right to open and close.

The order, so far as appealed from, should be affirmed, with twenty dollars costs and disbursements.

STOLPHER v. BOWEN MOTOR COACHES, INC.

Court of Civil Appeals of Texas, 1945. 190 S.W.2d 376.

SPEER, JUSTICE. Lorene Stolpher sued Bowen Motor Coaches, Inc., a corporation, and W. M. Summers jointly and severally for damages for injuries sustained by her, growing out of a collision between Bowen Motor Coaches, Inc. bus and the car of Summers in which plaintiff was riding, at a street intersection in the city of Wichita Falls.

For convenience, we shall refer to defendant Summers by name and to Bowen Motor Coaches, Inc., as Bowen.

Plaintiff alleged separate and distinct acts of negligence against each of the defendants, Summers and Bowen. Immediately following the paragraph in which negligence was charged to each, is paragraph 3 of the petition, which reads: "That the aforesaid acts of negligence jointly and severally are a direct and proximate cause of plaintiff's injuries which will be more fully hereinafter set out." There was prayer for joint and several judgment against both defendants. The petition is sufficient to indicate the extent of plaintiff's injuries.

Each of the defendants, Summers and Bowen, was represented at the trial by different counsel. They each denied plaintiff's right of recovery and especially plaintiff's alleged negligent acts attributed to each of them. In addition to its denial of any acts of negligence proximately causing any injuries sus-

tained by plaintiff, Bowen alleged that Summers, who owned the car in which plaintiff was riding at the time of the collision, was guilty of negligence in many respects, proximately causing any injury sustained by plaintiff. Negligent acts charged by Bowen against Summers were substantially the same as those alleged by plaintiff against Summers and because thereof Bowen pled over against Summers for recovery of any sum of money that should be recovered by plaintiff against it.

Likewise Summers in addition to his denial of negligence charged by plaintiff alleged that any injuries sustained by plaintiff were the direct and proximate result of negligent acts of Bowen and prayed for judgment over against Bowen for any amount that plaintiff should recover against him. The acts of negligence charged by Summers against Bowen were substantially the same as those alleged by plaintiff against Bowen. In addition to Summers' denial of liability and his plea over against Bowen, above mentioned, he also cross-actioned against Bowen for damages to cover personal injuries sustained by him and property damage to his automobile based upon his allegations of negligence against Bowen.

The judgment of the court and statements found in the respective briefs indicate that Trinity Universal Insurance Co. carried insurance on the Summers car and had paid him for said damages and was by the court permitted to intervene in the suit ostensibly to recover from Bowen the amount it had paid Summers in the event it was determined upon the trial that Bowen was responsible for the loss. The insurance company was denied recovery by the court. The intervener has not appealed and that phase of the case requires no further attention at our hands.

There is no statement of facts in this record, and we may presume that such special issues as were submitted to the jury were raised by the testimony adduced. We know they were raised by the pleading. The jury verdict in response to special issues acquitted both Summers and Bowen of all acts of negligence and proximate cause. The jury found in response to a special issue that the collision was the result of an unavoidable accident, and the court entered judgment on the verdict: (1) That plaintiff, Lorene Stolpher, take nothing by her suit; (2) that cross-plaintiff, Summers, take nothing on his cross-action as against Bowen (we construe this to mean that Summers take nothing against Bowen in his cross-action for personal injuries and property damage); and (3) that the intervener, Trinity Universal Insurance Co., take nothing by reason of its intervention. In the disposition made of the case by the court naturally nothing was said with reference to the pleas over of either Summers or Bowen.

The appellant, plaintiff, seeks a reversal of this case upon a single point of assigned error. It reads: "The court erred in refusing to permit the attorney for the plaintiff (Stolpher) to conclude the argument before the jury, where the attorney for one of the codefendants, Summers, made an argument of 45 minutes to the jury and to which argument the plaintiff was denied the right to reply."

The assigned point of error is preserved by a bill of exception which has the approval of the court with qualifications. The record reflects that taking of testimony began on Tuesday, February 27, 1945, and that on the following Friday the testimony was closed; on Saturday, following, the charge was read to the jury and arguments heard. The court's qualification to the bill of exception in support of the point of error, in substance, relates the proceedings had and they are: The court first allotted to each side one hour in which to argue the case with the exception of the intervener who was given a very limited time. Plaintiff's counsel had argued 30 minutes, and the court indicated to him the length of time he had argued, feeling that he had not fully opened the case, and voluntarily extended the time of each side 30 minutes. The plaintiff's counsel continued his argument until he had consumed 45 minutes of the time allotted to him. Counsel for defendant and cross-plaintiff, Summers, argued his phase of the case for 45 minutes. At the expiration of Summers' counsel's argument defendant Bowen's counsel waived argument, and the court declared the arguments closed denying plaintiff's counsel the right to a closing argument in response to the argument made by Summers' counsel; the court being "of the opinion in the face of the defendant's (Bowen's) waiver of argument that there was no good reason to prolong said trial by additional argument, particularly in view of the fact that the court did not consider the argument of (counsel for) defendant Summers and cross-plaintiff Summers of such a nature, or as having broached any matter that would require or necessitate rebuttal argument upon the part of plaintiff, and that the submission of said case to the jury without further argument did not, in the opinion of the court, affect or in anywise injure said plaintiff or the result of said case." There is a further recitation in the qualifications to the effect that there was a controversy as to the issues of liability, but the court declined to certify "that same were sharply controverted."

As above noted, the sole point of error assigned by plaintiff is the refusal of the court to permit him to make a closing argument to that made by counsel for defendant Summers. The record discloses that in excepting to the action of the court

in denying him the privilege of a closing argument counsel stated: "In this connection the attorney for plaintiff states that he would have confined his argument to a reply to the argument made by Judge Napier (counsel for Summers) and that was all he requested an opportunity to do."

Counsel for defendant Bowen waived argument, and of course, plaintiff's counsel could not make a second argument as against that defendant. The entire argument of Summers' counsel was brought forward in the record, and as we construe it, was very effective in behalf of that defendant. To us it is not difficult to see why plaintiff's counsel desired to make a reply to it. Summers' counsel severely criticized plaintiff for the attitude she assumed in this case in suing Summers along with Bowen; he criticized plaintiff's testimony in many respects and pointed out parts which he claimed were in conflict with other parts; in effect, he argued that the jury could not give effect to those parts that were against his client. Counsel in his argument likewise criticized what he termed a change in her attitude toward Summers after she consulted with attorneys. During his earnest appeal to the jury to not return a verdict for any amount against Summers, he said: "I don't think it is hardly right to say this boy (meaning Summers) was guilty of negligence. She (meaning plaintiff) had good eyes. It (the collision) occurred regardless of what you say. Consider the undisputed facts and the very physical facts show that there was not any negligence on the part of this boy. I don't think she was guilty of negligence in not seeing the bus. I think that bus travelled out there by that building too quick for anybody to see it; nobody in our car saw that bus." Absent the statement of facts, we do not know how Bowen's driver or other witnesses described the conditions surrounding the sudden collision, but the verdict reflects that the jury believed Bowen was without fault. Argument of Summers' counsel above, to the effect that he did not believe even plaintiff was to blame for not seeing the bus—that the bus came out beyond the building too quickly for anybody in Summers' car to see it, and other similar arguments may have been persuasive to the jury to find, as it did, no negligence by either defendant, and that it was an unavoidable accident. If such argument did have that effect it inured to the benefit of Bowen, even though its counsel did not argue the case at all.

The qualification of the bill of exception by the court to the effect that there was no good reason to prolong the trial by additional argument, and that he did not consider the argument of counsel for Summers to be of such a nature as to necessitate rebuttal argument, would not necessarily control the rights of

plaintiff's counsel to a rebuttal or closing argument. The result of the trial and the verdict rendered against plaintiff clearly indicates the effectiveness of either the testimony adduced, which we do not have, or the appeal of Summers' counsel in his argument. It has long been recognized in our procedural jurisprudence that the party upon whom the burden of proof rests shall have the right of opening and concluding arguments to the jury. Old rule for county and district courts 36, now rule 269, Texas Rules of Civil Procedure.

Under the provisions of old rule 31, and now embraced in rule 266, T. R. C. P., provisions are made for a defendant to timely file with the court an admission that the plaintiff is entitled to recover as set forth in the petition except insofar as such defendant may defeat in whole or in part said allegations under his answer in which event the defendant assumes the burden of proof and is entitled to the opening and closing of arguments. It is not contended that the conditions of rule 266, last mentioned are applicable to this case. It must be conceded that the right of argument of counsel is a valuable one to his client before a jury of laymen, and it has been held to be reversible error to wrongfully deprive one of the exercise of that right. *Meade v. Logan*, Tex. Civ. App., 110 S. W. 188, writ denied. This is especially true where the issues are sharply conflicting. *Kennedy v. McCauley*, Tex. Civ. App., 236 S. W. 752; *Stone v. Morrison & Powers*, Tex. Com. App., 298 S. W. 538, 540. There are many decisions to be found which hold that the right of a concluding argument is a valuable one; this is obvious to all members of the bench and bar. Some of the cases, as we have indicated, emphasized the importance of a closing argument when the issues are "sharply conflicting." The trial court in this case, in his qualification of the bill of exception, concludes with this language: "There was a controversy as to the issues of liability, but the court does not certify that same were sharply controverted." We do not have the evidence before us, but we do know that four days were consumed in taking testimony and from this we may fairly assume that the issues of liability were controverted as found by the court. A review of the arguments presented indicates to us that the construction placed upon the evidence by the respective attorneys presents a very sharp controversy as to liability. There may not have been a serious controversy as to the extent of plaintiff's injuries.

We have been cited to no case nor have we found one wherein plaintiff was denied the right of a reply or concluding argument to that of defendant's counsel in such a case as this; but bearing upon a denial of the right of a defendant to open and conclude

an argument, after he had filed the admissions provided by rule 266 T. R. C. P. (old rule 31) the denial of the right of a reply or concluding argument by defendant's counsel has, many times, been held reversible error, and the courts have gone far enough to say that injury from a violation of that rule will be presumed, 41 T. J. 764, Sec. 50.

We hold that the trial court erred in denying plaintiff's counsel the right to make a reply or concluding argument in response to that made by the counsel for defendant Summers.

. . .

We pointed out in the early part of this opinion that in addition to Summers' plea over against Bowen for judgment for any amount that plaintiff might recover against him, he instituted an independent cross-action against Bowen for personal injuries sustained and for damage to his automobile. Trinity Universal Insurance Company intervened and apparently sought some kind of a judgment against Bowen Motor Coaches, Inc.; its pleadings are not in the record, but we do know it had no "plea over" against Bowen for it was not a co-defendant. The judgment of the court denied Summers recovery on his cross action and denied the insurance company a recovery as intervener. No appeal was taken by either Summers or the insurance company; in these respects the judgment became final. The judgment relating to Summers' cross action and interveners' asserted cause of action will be left undisturbed, but for reasons hereinabove shown and under the authorities cited, the judgment of the trial court will, in all other respects, be reversed and the cause remanded for another trial. It is so ordered.¹

Addendum to Chapter IX, Section 1, Page 386, supra.

MILLER v. NATIONAL CITY BANK OF NEW YORK

Circuit Court of Appeals of the United States, Second Circuit, 1948. 166 F.2d 723.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Bernard Miller against National City Bank of New York and Guaranty Trust Company of New York involving a claim on a participating certificate issued to plaintiff as a participant in loan to the Imperial Russian Government. From two judgments dismissing amended complaint on defendants' motions for summary judgment, 69 F.Supp. 187, the plaintiff appeals.

Affirmed.

¹ Cf. Hilliker v. Thorndale, 295 Ky. 148, 173 S.W.2d 977 (1943).

FRANK, CIRCUIT JUDGE.¹ Appellees were two of five members of a banking group which, on June 14, 1916, made a written offering to the public, inviting participation in a loan to the Russian Imperial Government, then in the process of negotiation. The offering recited that the banking group was arranging a three-year, six-and-one-half-percent, credit of \$50,000,000 in New York on behalf of the Imperial Government; and that the group, in addition, would have options to buy rubles or Russian Treasury bonds at stated dollar rates, which might be resold at a profit, the profits from the entire transaction to be distributed ratably among participants on final settlement of the account. On June 18, 1916, the banking group signed an agreement with the Russian Government, as outlined above. By June 19, 1916, the \$50,000,000 was fully subscribed. Appellant claims to be one of the original subscribers to the extent of \$5,000. On July 10, 1916, the actual credit for the Russian Government was established, consisting of \$25,000,000 in each of the defendant banks. In January, 1917, the banking group issued participation certificates in the loan, one of which is held by appellant. In November 1917, the Czarist Government was overthrown, and the new Russian government repudiated Russia's foreign debt, including the amount owed under the credit agreement with the banking group. On July 1, 1919, a Certificate Holders' Protective Committee was formed to represent the certificate holders in attempting to secure payment or liquidation of the credit. Appellant alleges that five of the seven members of the committee were executive officers of the members of the original banking group, and dominated and controlled the committee. The committee ceased its operations in October 1938.

Appellant's complaint is based on the following allegations: On November 7, 1917, at the time when the Russians repudiated their debt, there remained on deposit with appellee Guaranty Trust Company a balance of about \$5,000,000 in the Russian credit account; Guaranty misappropriated this amount for its own use, by closing the existing account and transferring the \$5,000,000 to a new account in the name of the Russian government, opened without Russian authority; at the same time, Guaranty debited the new account with \$9,000,000 purportedly representing the indebtedness of private Russian banks to the Guaranty. Guaranty maintains, on the other hand, that the entire original credit was exhausted on July 2, 1917, and the only funds which it held thereafter for the account of the Russian government were the proceeds of a separate \$5,000,000 deposit made

¹ All footnotes, except those in brackets, are the court's. Some of the court's footnotes have been omitted.

with it, on July 12, 1917, by the financial attache of the Russian Embassy, out of moneys loaned by the United States to the Russian government. This deposit, says Guaranty, was set off on February 25, 1918, against its own claim for a greater amount against Russia arising from the Soviet Government's nationalization of the Russian banks.

Disputes which arose out of the foregoing set of circumstances gave rise to a total of five similar actions in the New York state courts, one brought by appellant here. One suit was discontinued. The other four terminated favorably for the defendants in judgment for them on the ground of the statute of limitations.

In the state court action between appellant here and Guaranty, the original complaint alleged that plaintiff had purchased his participation after the execution of the credit agreement but prior to July 10, 1916, the day the actual credit was established. In the complaint before us, appellant alleges that the entire participation was fully subscribed "on or before June 18, 1916," the day the credit agreement was signed, and that he was one of the original subscribers. This represents the only significant difference between the two complaints. Defendant, in the state-court action, moved to dismiss the complaint under Rule 107, New York Rules of Civil Practice, on the ground that the cause of action was barred by the statute of limitations, supporting his motion by affidavits. Plaintiff opposed the motion with answering affidavits, in which he set out the banking group's offering of June 14, 1916, and the fact that the participation had been fully subscribed by June 19, 1916. The New York Supreme Court dismissed the complaint on the merits, on the ground of the statute of limitations, stating (1) that no express trust had been created, and (2) that plaintiff's cause of action accrued as early as June 18, 1919. The Appellate Division affirmed without opinion.

Appellant began the instant suit on March 6, 1942. Both defendants moved to dismiss the complaint for lack of the requisite jurisdictional amount in controversy. We reversed the judgments of the district court which had granted these motions, *Miller v. National City Bank*, 2 Cir., 147 F.2d 798, but expressly did not pass on the merits of the claim. After our mandate was filed, plaintiff amended his complaint. Guaranty moved, under Rule 56,² for summary judgment dismissing the amended complaint on the grounds of (1) *res judicata*, and (2) the statute of limitations. The National City Bank moved for dismissal, under Rules 56 and 12, on five grounds. The district court declined to pass on the issue of *res judicata*, but dismissed the complaint as

² [See *supra* p. 571.]

to Guaranty on the grounds of the statute of limitations, concluding, "that if the New York law barred the former claim, it must logically bar the latter." It dismissed the complaint as to the National City Bank solely upon the ground of a lack of a sufficient jurisdictional amount. Appellant brought this appeal.³

1. *Dismissal as to the Guaranty Trust Company.*

The theory of appellant's claim against Guaranty is that it became trustee of an express trust for the benefit of the participants, that that trust is subsisting and unrepudiated, and that the statute of limitations does not run in favor of a trustee until he has accounted for, or openly repudiated, the trust. Whatever may be the merits of appellant's argument on this issue, we have been prevented from passing upon it by the decision of the state court.

Although the district court expressly declined to pass on the question of *res judicata*, we believe that that doctrine must control our decision here. The *res judicata* effect of a prior judgment on the merits depends on whether the second action between the same parties is upon the same or a different cause of action.⁴ If it is upon the same cause of action, a judgment on the merits creates an absolute bar to a subsequent action between the same parties, regardless of the arguments presented by the parties in the first suit and even if the judgment was erroneous.⁵ The New York courts had before them the same parties as are now before us, and in a suit arising from the same transaction. If the cause of action in that case was the same as in this, then appellant must be bound by that decision, although his attempted recovery now rests upon another legal theory. In such circumstances, *res judicata* "makes white black, the crooked straight, the straight, crooked," as between the litigants.⁶

Appellant maintains that the causes of action against Guaranty asserted here and in the state court actions are not the same, be-

³ [The court's discussion of the appeal from the judgment in favor of the National City Bank, which it affirmed, is omitted.]

⁴ *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 71 L.Ed. 1069.

⁵ *New York State Labor Relations Board v. Holland Laundry, Inc.*, 294 N.Y. 480, 493, 494, 63 N.E.2d 68, 161 A.L.R. 802; *Schuykill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456; *Chicot County District v. Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329; *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 71 L.Ed. 1069. See *Travelers Ins. Co. v. Commissioner*, 2 Cir., 161 F.2d 93, 95, 96; *Buchanan v. General Motors Corp.*, 2 Cir., 158 F.2d 728.

Clearly, who criticizes what he considers undesirable extensions of the "might-have-been-litigated" aspect of the *res judicata* doctrine, has no such criticism where it is applied when the difference between the first and second suit is but one of legal theory. *Clearly, Res Judicata Re-examined*, 57 *Yale L.J.* (1948) 339, 343, 346.

⁶ *New York State Labor Relations Board v. Holland Laundry, Inc.*, 294 N.Y. 480, 494, 63 N.E.2d 68, 161 A.L.R. 802.

cause in the state court the participation certificates were invoked as the original contracts giving rise to the trust, while here the amended complaint is based on the original offering and subscription before the establishment of the credit. Appellant errs, however, in maintaining that the state court could consider only plaintiff's complaint as it was pleaded and that it must have considered the claim as one based on the participating certificate. The original offering and subscription were both before the state court in plaintiff's affidavit opposing the motion under New York Civil Practice Rule 107(6), to dismiss for a defect not apparent on the face of the complaint. Such a motion under New York law is more in the nature of a motion for summary judgment than a demurrer. Unlike a motion under Rule 106 for a dismissal for a defect apparent on the face of the complaint, which has replaced a demurrer in New York State, a motion under Rule 107 requires the submission of affidavits by the moving party, and permits the submission of affidavits in opposition to the motion. If these affidavits raise an issue of fact, the court, acting under Rule 108, may refer it to a jury or referee. Where no issue of fact is raised, the judge will decide the issues of law on the papers before him.⁷ True, in such a case where no affidavits are filed in opposition to the motion, the allegations of the complaint must be taken as true.⁸ But we find no cases holding that, where such affidavits are filed, the judge must ignore them and confine his attention to the complaint; indeed, such a holding would destroy any purpose in filing affidavits in opposition to the motion.

The case of *Brick v. Cohn-Hall-Marx*, 283 N.Y. 99, 27 N.E.2d 518, on which appellant principally relies, does not bear out his position. There plaintiff had originally brought suit on a contract, and the Court of Appeals had sustained a dismissal under Rule 106 on the grounds of the statute of limitations for a defect apparent on the face of the complaint. In a second suit, that dismissal was held no bar to an action on the same contract alleging a seal, where the new complaint avoided the defects of the old. The case does not control the situation at bar. In the *Brick* case, the first judgment was not on the merits, but was for a defect on the face of the complaint under Rule 106; here the first judgment was expressly on the merits, and for a defect not apparent on the face of the complaint under Rule 107(6). The *Brick* case holds that where a cause of action is dismissed under Rule 106 for a defect apparent on its face, not on the merits, plaintiff is not

⁷ *Koerner v. Apple*, 120 Misc. 266, 199 N.Y.S. 171, affirmed 214 App.Div. 716, 209 N.Y.S. 861; *Stern v. Auerbach*, 203 App.Div. 681, 197 N.Y.S. 295; 3 *Carmony*, New York Practice, §§ 1053, 1057, pp. 2288, 2295.

⁸ *Nasaba v. Harfred Realty Corp.*, 287 N.Y. 290, 296, 39 N.E.2d 243; *Locke v. Pembroke*, 280 N.Y. 430, 21 N.E.2d 495.

barred from a new action where the defects of the first complaint are cured. It does not hold, as appellant contends, that a motion under Rule 107(6) is a demurrer, or that, where a complaint is dismissed on motion, on the merits for a defect not apparent on its face but indicated by the affidavits on the motion, the litigant can successfully maintain a second suit on a different legal theory.

It appears, then, that the state court, in determining that the statute of limitations had run against appellant, must be assumed to have considered the offering and subscription as well as the participation certificates. Thus the same facts were before that court as are here before us. To be successful, a claimant must state facts which constitute a cause of action by establishing the unlawful violation of a right. Under the facts before both the state court and the district court, we can see only one possible, unlawful act, namely, the breach of a fiduciary duty, if any, which Guaranty owed to the participants. Therefore, appellant must be bound by the state court decision on that cause of action, although here he asserts a different ground of relief.

2. *Dismissal as to the National City Bank:* [see footnote 3.]

*

INDEX

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

ABATEMENT,

Of nuisances,

- by action69, 132
- by self-help 12

See ACTION; NUISANCE; SELF-HELP

Pleas in: See PLEAS, Dilatory

ABOLITION OF,

Demurrers: See DEMURRERS, Abolition of

Distinctions between,

- actions at law and suits in equity: See EQUITY, Suits in courts of
- law and of equity: See COURTS, Unification of legal and equitable
- procedure: See EQUITY, As a Procedural System

Forms of action: See FORMS OF ACTION, Abolition of

Formulary system: See FORMULARY SYSTEM, Abolition of

ACTIONS,

- As means to remedies10, 13, 14, 79
- distinguished from self-help12-13

At law, distinguished from suit in equity14 n. 1

Class59 n. 1

Collusive: See JUSTICIABILITY

Devices for instituting,

- bill 267
- filing of complaint272-3
- original writ: See ORIGINAL WRIT
- service of summons14, 264, 272-3

Forms of: See FORMS OF ACTION

Local and transitory354-5

Personal, real and mixed 271

The single civil324-5, 555

See EQUITY, Suits in; FORMS OF ACTION; SELF-HELP

ADMISSIONS,

Allegations as 600

By demurrer: See DEMURRERS, Admissions by

By failure to deny191, 517, 518, 520, 521, 677

status of admitted allegations79 n. 2

By inconsistency of allegation655, 659, 668

ADVISORY OPINIONS: See JUSTICIABILITY

AFFIDAVITS, USE OF ON MOTIONS,

For summary judgment: See SUMMARY JUDGMENT

To dismiss a complaint: See MOTIONS FOR JUDGMENT

To strike out: See SHAM PLEADINGS

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

AFFIRMATIVE DEFENSES,

- Anticipation of, by complaint: See COMPLAINT, Anticipating Defenses
- As a procedural conception 451
- As a substantive conception 617-636
- As defenses in point of fact: See DEFENSES
- Defined,
 - what is "new matter" 60, 61 N. (1), (2), 75 n., 77, 78, 300, 381, 605, 617-636, 666 N. (5), 688
- Devices for interposing,
 - at common law: See GENERAL ISSUE; PLEAS under the codes
 - the answer: See ANSWER
- Distinguished from causes of action 140-4, 622
- Distinguished from negative defenses 171, 187-189, 605, 620 n. 1, 622, 624
- Effect of failure to plead: See DEFENSES, Waiver of
- Hypothetical: See PLEADING, Hypothetically
- Inconsistency of: See JOINDER, Of defenses
- Joinder of: See JOINDER
- Joinder of, and negative defenses: See JOINDER
- Nature of 170-2, 189
- Procedural consequences of,
 - creation of burden of pleading 676-697
 - creation of burden of proof 662-3, 698-704
 - creation of privilege of disproof 705-8
 - transfer of right to open and close 663, 708-723
 - See DISPROOF; OPEN AND CLOSE, Right to; PLEADING, Burden of; PROOF, Burden of
- Separate statement of 650-1
- Sham: See SHAM PLEADINGS
- Statements of,
 - formal structure of 170-2
 - procedural regularity of 650-676
 - incorporating denials in 651, 652-5, 668 n. 1
 - joinder of inconsistent: See JOINDER
 - required specificity of 671-6
 - substantive adequacy of,
 - in fact 645-650
 - in law 636-644
 - devices for testing
 - demurrer 548-9, 636, 644
 - demurrer ore tenus 644
 - motion to strike out 549, 638, 640
 - test of 636, 638, 640
 - theory of 636-644
- Waiver of: See DEFENSES, Waiver of
- See ANSWER; CAUSE OF ACTION; DEFENSES; DEMURRERS; MATERIALITY; NEGATIVE DEFENSES; REPLY

AIDER,

- By subsequent pleadings 379-381
- By verdict 393-406

ALLEGATION,

- Admission of: See ADMISSIONS
- Ambiguous 219, 225 N. (2), 235 N. (8)
- As that which is alleged 169

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

ALLEGATION (Continued)

As the act of alleging	169
Consistency of: See CONSISTENCY	
Distinguished from,	
assertion	169 n. 7
denial	169
Effect of failure to deny: See ADMISSIONS	
Form of	71
See SENTENCES	
Implicit: See AIDER	
Of conclusions: See CONCLUSIONS	
On information and belief	524-6, 671-2
Required specificity of	213-7, 220-231, 301
Substance of: See PROPOSITIONS; STATEMENT, About a Matter of Law	
See CONTRADICTION; DENIALS; ISSUES; MATERIALITY; PLEADING; PROPOSITIONS	

ALTERNATIVE,

Causes of action: See CAUSES OF ACTION, Joinder of
Defenses: See DEFENSES, Alternative
Pleading: See PLEADING, Alternatively
Remedies: See REMEDIES

AMBIGUITY,

Of allegation: See ALLEGATION, Ambiguous
Of denial: See DENIALS, Negatives Pregnant

AMENDMENT,

After demurrer sustained	423, 425
Before,	
ruling on demurrer	422
trial	422, 432, 437, 438, 447, 459
Changing,	
cause of action	432-450, 459, 466-7
before trial	432, 437, 438, 459
during trial	445, 448
defenses	451
parties	440 n. 1, 447, 455, 466
During trial	402-5, 447, 461
Motions for leave to amend	427, 429, 431, 446, 451, 460, 463
Of answer	404, 428, 451
Of complaint	422, 425
Of course	422, 423
Of pleading previously amended	431-2
Of reply	422
On or after appeal	452, 457, 468, 485 N. (4)-(5)
Relation back of	454, 467
Second or subsequent	431-2
Statute of limitations and	452-469
To conform to proof	402-5, 447-451, 461, 466-7
With leave	187 n. 5, 423, 425-469
See AIDER; AFFIRMATIVE DEFENSES; ANSWER; APPEAL; CAUSE OF ACTION; COMPLAINT; DEMURRERS; MOTIONS; PLEADING OVER; REPLY	

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

ANSWER,

- Amendment of: See AMENDMENT
- Contents of68, 517, 617-8
- Denials in: See DENIALS, Incorporation in Affirmative Defenses
- Form of 520
- Formal structure of170-2
- Functions of162, 517, 556, 617-8, 680
- In abatement: See OBJECTION IN LAW
- Interposing defenses in point of law: See DEFENSES IN POINT OF LAW
- Motion upon affidavits in lieu of: See MOTIONS FOR JUDGMENT
- Sham: See SHAM PLEADINGS
- See AFFIRMATIVE DEFENSES; COMPLAINT; DEFENSES; DENIALS; NEGATIVE DEFENSES; REPLY

APPEAL,

- Amendment on or after: See AMENDMENT
- Appealable judgments and orders,
 - final judgments or orders470, 472, 473, 476, 490
 - defined79, 80, 83, 84, 86, 88, 470-1, 477, 478, 480 n. 2, 481 N. (1)-(2), 489, 547
 - distinguished from
 - findings 85
 - interlocutory judgments and orders80, 84
 - orders for judgment 82
 - verdicts 80
 - final judgment rule477, 488 N. (1)
 - review of interlocutory orders on appeal from472, 473, 474, 483, 484 N. (2)
 - waiver of right to486 N. (7), 487 N. (8)-(9), 488 N. (10)
- interlocutory judgments or orders,
 - in general470, 472, 473, 474, 476, 490, 716
 - pre-trial541, 547
 - preventing final judgment472, 473
 - upon demurrers,
 - appealable as of right470, 472, 474-6
 - waiver of right471-2, 485 N. (6)
 - appealable by leave472, 481 N. (2), 482 N. (4), 490
 - non-appealable478, 481 N. (1), 482 N. (3), 483 N. (1), 485
 - review of, on appeal from final judgment483, 484 N. (2)
 - waiver of right to486 N. (7), 487 N. (8)-(9), 488 N. (10)
- Motion to dismiss 39
- Pleading over after: See PLEADING OVER

ASSUMPSIT281-3, 301

See COVENANT; DEBT; FORMS OF ACTION; FORMULARY SYSTEM; ORIGINAL WRIT

BILL OF PARTICULARS: See MOTIONS**BURDEN OF PLEADING: See PLEADING, Burden of; PROOF, Burden of****BURDEN OF PROOF: See PROOF, Burden of****CASE, ACTION ON THE,**

- Declaration in266, 291, 303
- Distinguished from trespass16, 277-280, 289, 330, 333, 337, 346

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

CASE, ACTION ON THE (Continued)

Origin of 267-8, 279
Scope of 16, 279, 289-290, 292-3, 330, 342
See FORMS OF ACTION; FORMULARY SYSTEM; ORIGINAL
WRIT; TRESPASS

CAUSE OF ACTION,

As a procedural conception 438-450, 452-469
See AMENDMENT, Changing Cause of Action
As a substantive conception,
a prima facie right to a remedy 132-4, 139, 140
the legal and factual conditions of a remedy 137-8, 139, 144-157, 432
Distinguished from
defense in point of fact 140-4
demand for judgment 137-9
form of action 263, 274-284
remedy 133-4, 139
Elements of a 61, 62, 64, 67, 134 n. 3, 144-157
See DECLARATORY JUDGMENTS
Failure to state, as a defense: See DEFENSES IN POINT OF LAW
Joinder of two or more: See JOINDER
separate statement of 81, 195, 651
See COUNT
Statement of a,
formal structure of 71, 170-2, 366
procedural regularity of 191-7, 199-257, 213-7, 220-239, 679
substantive adequacy of
in fact 564, 568
in law 170-2, 174, 187-8, 368, 679
test of 170-2, 179, 195, 224, 285-7
theory of 75, 170-2, 179, 195, 224, 285-7
See CLAIM FOR RELIEF; COMPLAINT; COUNT; DEFENSES;
DEMAND FOR JUDGMENT; DEMURRERS; MOTIONS;
REMEDIES

CIVIL PROCEDURE: See CONTROVERSY; PROCEDURAL LAW

CLAIM FOR RELIEF,

As a substantive conception 239-251
distinguished from cause of action 239-250
Failure to state, as a defense 239-250
Statement of,
procedural regularity of 216 N. (2), 239-251, 300-1
substantive adequacy of 239-250
See CAUSE OF ACTION

CODE PLEADING,

As fact pleading 166, 320-362, 656-7
Distinguished from common law pleading: See COMMON LAW
PLEADING
See COMMON LAW PLEADING; EQUITY, Pleading in

COMMON LAW PLEADING,

As issue pleading 162-3, 310, 363
Classification of rules of 303-4
Critiques of 163-4, 310-311, 323

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

COMMON LAW PLEADING (Continued)

- Distinguished from,
 - code pleading 311, 320-1
 - equity pleading 310-311
- Fictions in 18, 28-33
- Formalism in 266
- Objects of 363-4
- See CODE PLEADING; EQUITY, Pleading in

COMPLAINT,

- Amendment of: See AMENDMENT
- Anticipating defenses 142-4, 174, 632, 679, 685
- Defects in, cured,
 - by answer: See AIDER
 - by verdict: See AIDER
- Demurrers to: See DEFENSES IN POINT OF LAW; DEMURRERS
- Dismissal of: See MOTIONS FOR JUDGMENT
- Elements of 136-8
- Formal structure of 170-2
- Functions of 136, 142-4, 162, 174, 187, 679
- Theory of: See CAUSE OF ACTION, Statement of a
 - See ANSWER; CAUSE OF ACTION; CLAIM FOR RELIEF;
DEFENSES; DEMAND FOR JUDGMENT; MOTIONS;
PLEADINGS, THE; REPLY

CONCEPT: See IDEAS

CONCLUSIONS,

- As the ends of syllogisms 212, 219
- Mixed, of fact and law 233 N. (5)
- Nature of 21
- Of fact,
 - distinguished from,
 - conclusions of law 212, 215 n. 5
 - ultimate facts 213-7
 - nature of,
 - legally 213-7, 674 N. (4)
 - logically 200, 212
 - objections to, as allegations 213-7, 674 N. (4)
- Of law,
 - nature of,
 - legally 220-237, 672 N. (1), 673 N. (2)-(3)
 - logically 200, 217-9
 - objections to, as allegations 200, 220-237, 672 N. (1), 673 N. (3)
- Pleading 213-7, 672-6
- See ALLEGATION; FACTS; PLEADING; PROPOSITIONS

CONFESSION AND AVOIDANCE: See AFFIRMATIVE DEFENSES; CAUSE OF ACTION; GENERAL ISSUE; PLEAS

CONSISTENCY,

- Of allegation: See PLEADING, Inconsistently
- Of causes of action: See JOINDER
- Of defenses: See JOINDER
- See INCONSISTENCY

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

CONTEMPT,

See DECREES; EQUITY; INJUNCTIONS; JUDGMENTS, Enforcement of

CONTRADICTION,

As means of creating issues4, 166-9, 507
Methods of166-9, 507-8
Nature of166-9
See ALLEGATION; DENIALS; INCONSISTENCY; ISSUES;
PROPOSITIONS

CONTROVERSY,

Arts of 2-3
Elements of legal: See CAUSE OF ACTION; DEFENSES; REMEDIES
Judicial function in relation to: See JUDICIAL FUNCTION
Justiciability of a: See JUSTICIABILITY
Moot: See JUSTICIABILITY
Nature of,
 in general 3-4
 legal 4
Processes involved in 4-5

CONVERSION20, 295-6, 340

See TROVER

COUNT,

As the statement of a cause of action38-9, 195, 296
See CAUSE OF ACTION, Separate Statement of

COUNTERCLAIM,

As a cause of action48, 626, 650, 676, 677
Necessity of replying to a: See REPLY, Mandatory
See AFFIRMATIVE DEFENSES; CAUSE OF ACTION; CLAIM
FOR RELIEF

COURTS,

Functions of: See JUDICIAL FUNCTION
Of equity: See EQUITY
Of law: See LAW
Unification of308-320

COVENANT,

As a form of action 301
See ASSUMPSIT; DEBT; FORMS OF ACTION

DAMAGES,

Compensatory, as a remedy for,
 breach of contract38-47
 torts38, 47-58
General43 n. 3
Liquidated42 n. 2, 296, 367-8
Nominal 34
Objects of, as a remedy13-15, 38, 47
Punitive 38
Special43 n. 3
Unliquidated296, 367-8
See REMEDIES; SPECIFIC REPARATION

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

DEBT,

As a form of action	297-300
origin of	297-9
scope of	297-300

See ASSUMPSIT; COVENANT; FORMS OF ACTION

DECLARATION: See COMPLAINT; PLEADINGS, THE, At Common Law

DECLARATORY JUDGMENTS,

Conditions of rendition of	117-131, 174
Jurisdiction to render,	
at common law	112, 115-7
by statute	117-131
Nature and objects of	115-8, 120-1, 130

See CAUSE OF ACTION; JUDGMENTS; JUSTICIABILITY;
REMEDIES

DECREES,

As the judgments of a court of equity	31, 41
Enforcement of	32, 41

DEFAULT: See JUDGMENTS

DEFENSES,

Alternative: See JOINDER; PLEADING, Alternatively	
As the conditions of avoiding a remedy	170-2, 186-8
Distinguished from causes of action	140-4
Inconsistency of: See JOINDER	
In point of fact,	
affirmative defenses: See AFFIRMATIVE DEFENSES	
negative defenses: See DENIALS; NEGATIVE DEFENSES	
In point of law: See DEFENSES IN POINT OF LAW	
Joinder of: See JOINDER	
Order of interposing,	
at common law	363-4
under the codes	364
Separate statement of	650, 651, 652, 653
Waiver of, by failure to interpose,	
in point of fact	631-6
in point of law	14, 328, 370, 371, 391-406, 412, 415

See CAUSE OF ACTION; CLAIM FOR RELIEF; REMEDIES

DEFENSES IN POINT OF LAW,

Order of interposing	415-6
Procedural irregularity: See CAUSE OF ACTION, Statement of a devices for interposing,	
at common law,	
general demurrer: See DEMURRERS, Common Law	
motion	410 n. 3
special demurrer: See DEMURRERS, Common Law	
under the codes,	
demurrer	220-235, 411
motion,	
for bill of particulars	232 N. (2)
for judgment	215, 216 N. (2), 370, 372, 374
for judgment on the pleadings	227
to correct	413

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

DEFENSES IN POINT OF LAW (Continued)

- Procedural irregularity: See CAUSE OF ACTION, Statement of a (Continued)
- devices for interposing (Continued)
 - under the codes (Continued)
 - motion (Continued)
 - to make more definite236 N. (S), 237, 251, 255, 412
 - to strike out205, 236 N. (S), 413, 414
 - objection in law370, 372, 374
 - nature of239, 244, 247, 407
 - Rules regulating use of devices for interposing375-393
 - Substantive inadequacy,
 - devices for interposing,
 - at common law,
 - general demurrer 365
 - special demurrer 407
 - under the codes,
 - demurrer 213
 - motion,
 - for judgment370, 371, 372, 374
 - to strike out 373
 - objection in law370, 372, 374
 - nature of170-2, 187, 368, 370-1
 - Waiver of: See DEFENSES, Waiver of
 - See ALLEGATION; AMENDMENT; CAUSE OF ACTION; CLAIM FOR RELIEF; COMPLAINT; CONCLUSIONS; DEFENSES IN POINT OF FACT; DEMURRERS; ISSUES, Of Law; MATERIALITY; MOTIONS; MOTIONS FOR JUDGMENT; MOTIONS TO STRIKE OUT; PLEADING

DEMAND FOR JUDGMENT,

- As an element of a complaint136-8
- As limiting the award of remedies136-7, 139-140
- Distinguished from statement of cause of action137-9
- See COMPLAINT; JUDGMENT; REMEDIES

DEMURRERS,

- Abolition of,
 - general370, 372, 373, 374
 - special370, 372, 373, 374, 409, 413
- Admissions by213, 225 N. (1), 367, 378
- See ADMISSIONS
- Amendment of pleadings demurred to: See AMENDMENT
- Analogues of: See MOTIONS; OBJECTION IN LAW
- Appeals from orders on: See APPEAL
- As device for,
 - creating issues of law170-2, 367, 372
 - interposing defenses in point of law365, 367, 369
- Code,
 - distinguished from common law 409
 - grounds of, to,
 - affirmative defenses548-550, 672 N. (1)
 - complaint137, 145, 369-370, 375, 679
 - negative defenses548-9
 - reply678-9, 691, 696 N. (1)

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

DEMURRERS (Continued)

Code (Continued)

required specificity of	375-8, 644
rules regulating use of	375-398
search the record	378-9
speaking	381-391

Common law,

distinguished from pleas	363
general,	

forms of	366
----------------	-----

nature and functions	365, 369
----------------------------	----------

special,

form of	408
---------------	-----

nature and functions of	365, 407
-------------------------------	----------

required specificity of	365, 407
-------------------------------	----------

Distinguished from motions	409-411
----------------------------------	---------

Judgments on,

appeals from: See APPEAL

as res judicata: See RES JUDICATA

Orders on	479
-----------------	-----

appeals from: See APPEAL

Ore tenus	137, 392, 393
-----------------	---------------

Pleading after interposing: See PLEADING OVER

Procedural consequences of	78
----------------------------------	----

Speaking	381-391
----------------	---------

Waiver of defenses by failure to demur: See DEFENSES, Waiver of

See ISSUES OF LAW; MOTIONS; OBJECTION IN LAW; PRO-
CEDURAL IRREGULARITY; SUBSTANTIVE INADEQUACY

DENIALS,

Ambiguous	529-532
-----------------	---------

Argumentative	512-3, 526-9, 624, 685 N. (2)
---------------------	-------------------------------

As defenses in point of fact: See DEFENSES, In Point of Fact

As devices for,

creating issues of fact	163-9, 170-2, 186-8, 369, 507
-------------------------------	-------------------------------

interposing negative defenses	170-2, 186-8, 507
-------------------------------------	-------------------

putting the opponent to his proof	552-589
---	---------

At common law: See GENERAL ISSUE; TRAVERSE

Evasive	518 n. 4, 519, 520-1, 532-5
---------------	-----------------------------

General,

form of	522
---------------	-----

nature of	517, 518 n. 1, 519, 522
-----------------	-------------------------

qualified	522-3
-----------------	-------

Incorporation in affirmative defenses	651, 652-5, 668 n. 1
---	----------------------

Nature of	169, 186-8
-----------------	------------

Negatives pregnant,

as admissions	531-2
---------------------	-------

what are, legally	530-2
-------------------------	-------

what are, logically	529-530, 531
---------------------------	--------------

Of knowledge or information	14 n. 2, 517, 518, 519, 520, 521, 524-6
-----------------------------------	---

On information and belief	524-6
---------------------------------	-------

Procedural consequences of: See NEGATIVE DEFENSES

Procedural regularity of	516-536
--------------------------------	---------

Qualified general	522-3
-------------------------	-------

Sham: See SHAM PLEADINGS

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

DENIALS (Continued)

- Specific,
 - form of20 n. 2, 524
 - nature of 524
- Substantive adequacy of: See **NEGATIVE DEFENSES**
- See **ALLEGATION; CONTRADICTION; INCONSISTENCY; NEGATIVE DEFENSES**

- DEPARTURE**382, 432-469, 695, 696 N. (1), 697 N. (2)
- See **AMENDMENT; REPLY**

DEPOSITIONS: See DISCOVERY

DETINUE,

- As a form of action15-19
 - distinguished from replevin16-18
 - judgment in 18
- As a means to restitution15-18
- See **EJECTMENT; FORMS OF ACTION; REPLEVIN; RESTITUTION**

DISCOVERY,

- Devices for,
 - depositions258-9, 576
 - inspection of documents 260
 - interrogatories259-260
 - pre-trial hearing: See **PRE-TRIAL HEARING**
 - requests for admissions 260
- Functions of250 N., 257-8
- In equity310-11, 554-5

DISPROOF,

- Burden of597-8, 627
- Defined 199
- Distinguished from proof199, 605
- Privilege of605, 705-8
- See **PROOF**

EJECTMENT,

- As a form of action28-31
 - declaration in 29
 - distinguished from statutory 19
 - original writ in 28
 - procedure in28-30
- As a means of restitution28-37
- Statutory31-7
- See **DETINUE; FORMS OF ACTION; REPLEVIN; RESTITUTION**

EQUITABLE REMEDIES,

- Compensatory damages 28
- Prevention of legal wrongs12, 30, 31, 33, 35
- Restitution 17
- Specific reparation: See **SPECIFIC REPARATION**
- See **DAMAGES; INJUNCTIONS; PREVENTING LEGAL WRONGS; REMEDIES; RESTITUTION**

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

EQUITY,

- As a procedural system308-9, 554-5
- abolition of distinctions between, and procedure at law.....14 n. 1, 311-320
- As a system of substantive law14 n. 1, 311-320
- Bill in26, 59
- Courts of12 n. 1
- judgments of: See DECREES
- jurisdiction of: See JURISDICTION
- unification with courts of law308-320
- Pleading in310-11, 554-5
- Suits in, as a means to equitable remedies 26
- abolition of distinction between, and actions at law 555
- See ACTION; EQUITABLE REMEDIES; LAW, Courts of

EVIDENCE,

- Admissibility of 599
- Allegations as600-3
- Function of2, 85
- Pleading199-200, 202-204, 205-212, 600, 675 N. (5)
- Relevancy of: See RELEVANCY
- See DISPROOF; PROBABILITY; PROOF; PROPOSITIONS

EXECUTION, WRIT OF: See JUDGMENTS, Means of Enforcing

FACT PLEADING: See CODE PLEADING

FACTS,

- As a procedural conception93, 94 n. 2
- As objects of,
 - knowledge: See KNOWLEDGE
 - proof and disproof: See DISPROOF; PROOF; PROPOSITIONS
- Categories of 189
- Distinguished from propositions166-9, 190, 202
- Evidential: See EVIDENCE; PROPOSITIONS; RELEVANCY
- Immaterial: See MATERIALITY
- Issuable 213
- See PROPOSITIONS, Material
- Nature of166-9, 190
- Operative 190
- Pleading: See ALLEGATION; PLEADING; PROPOSITIONS
- Proof of83 n. 2, 84
- Sufficiency of the, stated: See CAUSE OF ACTION; CLAIM FOR RELIEF; DEFENSES; REPLY
- Ultimate190, 213
- See PROPOSITIONS, Material
- See CONCLUSIONS, Of Fact

FICTIONS265, 322

FORM AND SUBSTANCE,

- Confusion of416-421
- Distinguished: See FORMULARY SYSTEM; PROCEDURAL IRREGULARITY; SUBSTANTIVE INADEQUACY

FORMS OF ACTION,

- Abolition of308, 320-6, 555
- Choice of appropriate form,
 - difficulty of266, 287-302, 305
 - necessity for261, 263, 284-7

INDEX

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

FORMS OF ACTION (Continued)

- Distinctions between,
 - original writ: See ORIGINAL WRIT
- pleading 262, 266
- procedure 262-3
- substantive scope 263-4, 285-6
- Distinguished from causes of action 265, 274-284
- Nature of 261-4, 266, 285-6
 - See ASSUMPSIT; CASE; COVENANT; DEBT; DETINUE;
EJECTMENT; FORMULARY SYSTEM; REPLEVIN; TROVER

FORMULARY SYSTEM,

- Abolition of 308, 320-6, 555
- As defining and limiting causes of action 274-284, 285-7
- Character of 261-6
- Critiques of 306, 308, 320-4
- Functions of original writ in: See ORIGINAL WRIT
- Influence upon development of the substantive law 263, 265, 274-284, 302
- Pleading in: See COMMON LAW PLEADING
- Vitality of 326-362

FRIVOLOUS PLEADING 562-4, 566 n. 1

GENERAL ISSUE,

- As a device for interposing,
 - affirmative defenses 510-2, 516, 560 n. 2, 622
 - negative defenses 262, 509-510, 516
- As a plea in bar 509
 - critique of 513-4
 - pleas amounting to 512-3
 - See AFFIRMATIVE DEFENSES; DENIALS; NEGATIVE
DEFENSES; TRAVERSE

HILARY RULES 514-5

See COMMON LAW PLEADING

HYPOTHETICAL PLEADING: See PLEADING, Hypothetically

IDEAS,

- In the legal order 201 n. 3, 218
- In the natural order 218
 - as knowledge 218
- Nature of 218

INCONSISTENCY, AS A LOGICAL CONCEPTION,

- Distinguished from contradiction 526-7
- Nature of 526-7
 - See CONTRADICTION; PROPOSITIONS

INFERENCE,

- Nature of 202
- Rules of 202-3
- Types of 203
 - See DISPROOF; PROOF; PROPOSITIONS; RELEVANCY

INFORMATION AND BELIEF: See ALLEGATION; DENIALS

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

INJUNCTIONS,

As means of,

preventing legal wrongs: See PREVENTING LEGAL WRONGS

restitution: See RESTITUTION

specific reparation: See SPECIFIC REPARATION

Mandatory 62

Nature of, as,

commanding conduct 62, 64

forbidding conduct 62, 64, 69, 74

Violation of, as contempt 89-91

See EQUITABLE REMEDIES

INTERLOCUTORY ORDERS: See ORDERS

INTERROGATORIES: See DISCOVERY

ISSUE PLEADING: See COMMON LAW PLEADING

ISSUES,

As involving opposition 166-7, 186, 369

Distinguished from questions 166

See QUESTION

Genuineness of, of fact,

as dependent upon truthfulness: See PLEADING, Truthfulness in

as preventing summary judgment: See SUMMARY JUDGMENT

Nature of 166-7

Necessity of definition of, by litigants 589-595

Of fact,

as theoretical problems 217-8, 369

See PROBLEMS

devices for creating: See ALLEGATION; CONTRADICTION; DENIALS; INCONSISTENCY

distinguished from issues of law 166-7, 170, 187

how constituted 166, 200, 369, 507, 526-9

how created 166, 170, 187-9, 507, 526-9

See CONTRADICTION; INCONSISTENCY

how tried and resolved 167, 217-8, 369, 536

Of law,

appellate review of decisions of: See APPEAL

as practical problems 217-8, 369

devices for creating: See DEMURRERS; MOTIONS; OBJECTION

IN LAW

distinguished from issues of fact 166-7, 170, 187

finality of decisions of: See APPEAL

how constituted 167, 369

how created 167, 170, 187, 369

how tried and resolved 167, 217-8, 369

judgments upon, as res judicata: See RES JUDICATA

priority of 186-8

Order of deciding 186-8

Statutory 78 n. 8, 677, 682, 691 N. (1), 704

See REPLY

JOINDER,

Of causes of action 133, 306, 307, 360, 650-2

Of defenses,

affirmative 650-1

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

JOINDER (Continued)**Of defenses (Continued)**

affirmative and negative	650-1
inconsistent	655-672
in fact	675 n. 5, 661-2, 663 N. (2), 665 N. (3)-(4), 666 N. (5)
in law	656, 659, 664
procedural consequences of	655, 659, 663 N. (2)
when permissible	655-669
negative	516-521
Of matter in reply	652, 677
See CAUSE OF ACTION; DEFENSES; INCONSISTENCY	

JUDGMENTS,

Appeals from: See APPEAL

At law	79
forms of,	
for defendant	20, 87, 425-426
for plaintiff	22-23, 79, 87, 88
By confession	364, 366
By default	364, 366-368, 524
Declaratory: See DECLARATORY JUDGMENTS	
Decrees as, of courts of equity: See DECREES	
Demands for: See DEMAND FOR JUDGMENT	
Entry of	82
Final, defined: See APPEAL	
effect of, as res judicata: See RES JUDICATA	
Functions of	83
Interlocutory	83
Means of enforcing	65-66, 88-93
of courts of law	79, 89-90
of courts of equity	90-93
Nunc pro tunc	82
Of nonsuit	467, 695
On verdicts	82
Rendition of	82
See REMEDIES	

JUDICATURE ACT: See FORMS OF ACTION; FORMULARY SYSTEM

JUDICIAL FUNCTION 10, 12-13, 110, 158, 594
 See JUSTICIABILITY

JUDICIAL NOTICE,

As the assumption of propositions	25
Effects of	507-8

JURISDICTION,

Nature of	43
Of the person: See ACTIONS, Devices for instituting	
Of the subject-matter,	
justiciability as a condition of: See JUSTICIABILITY	
of courts of equity	26, 59, 66, 74
of courts of law	32
of the Federal courts	97, 99, 156-7

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

JURY,

Functions of163, 169, 699

JUSTICIABILITY,

As a jurisdictional requirement94-117, 121, 124
 waiver of97, 101
 As a quality of controversies94-117
 Conditions of94-117
 Of friendly controversies100, 101-2
 See DECLARATORY JUDGMENTS

KNOWLEDGE,

As a proposition: See PROPOSITIONS, As Actual or Potential Knowledge
 Kinds of,
 direct or perceptual: See PROPOSITIONS, Immediate
 indirect or inferential: See PROPOSITIONS, Derived
 of particulars: See PROPOSITIONS, Elementary
 of relationships: See PROPOSITIONS, General

LAW,

Action at: See ACTION; EQUITY, Suits in
 Common, as a system of substantive law14 n. 1
 Conclusions of: See CONCLUSIONS
 Courts of12 n. 1
 Issues of: See ISSUES, Of Law
 Matters of: See STATEMENT, About a Matter of Law
 Of the case547-8
 Procedural: See PROCEDURAL LAW
 Substantive: See SUBSTANTIVE LAW
 See EQUITY

LEGAL RIGHTS AND DUTIES,

As elements of causes of actions: See CAUSE OF ACTION
 Nature of13, 144-157

LEGAL WRONGS,

As elements of causes of action: See CAUSE OF ACTION; DECLARATORY JUDGMENTS
 Modes of preventing: See PREVENTING LEGAL WRONGS
 Modes of righting: See REMEDIES
 Nature of10, 14-6, 144-157

MATERIALITY,

Ambiguity of word191 N.
 As a quality of demonstrable, elementary propositions212
 As a substantive conception186-7, 189, 191, 212
 Conditional207 n. 4
 Distinguished from relevancy199-200, 203-4, 206, 210
 Of contradictories of material propositions199
 Of propositions to,
 causes of action189, 191-8, 205, 210-12
 controversies189-190, 195, 300-1
 defenses,
 affirmative189, 300-1
 negative187, 199
 Test of187, 189
 See PROPOSITIONS: SUBSTANTIVE LAW

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

MOTIONS,

As devices for interposing defenses,	
in point of fact	384-391
in point of law	370-4
As the analogue of the,	
general demurrer	370-4
special demurrer	409-415
Distinguished from,	
demurrers	410-11
pleadings	410-11
For bills of particulars	232 N. (2), 255
For directed verdict	58, 151, 328, 575, 683, 690, 700, 703
For judgment: See MOTIONS FOR JUDGMENT	
For leave to amend: See AMENDMENT	
For new trial	40
For summary judgment: See SUMMARY JUDGMENT	
To correct pleadings	413
To make more definite	140, 214, 236 N. (8), 237, 251, 255, 412-5
To require on election	132, 661, 663 N. (1)-(2), 665 N. (4)
To require separate statement	653
To strike out: See MOTIONS TO STRIKE OUT	
See DEMURRERS	

MOTIONS FOR JUDGMENT,

Dismissing the complaint,	
on the complaint,	
as the analogue of the general demurrer	128, 134, 215, 216 N. (2), 370, 372, 374
grounds of	239, 244, 247
rules regulating use of	375-393
waiver of defenses by failure to make: See DEFENSES, Waiver of	
on the complaint and affidavits	384-391
On the pleadings,	
as the analogue of the general demurrer	20, 125, 227, 349, 370-2, 428, 523
See DEMURRERS	

MOTIONS FOR SUMMARY JUDGMENT: See SUMMARY JUDGMENT

MOTIONS TO STRIKE OUT,

Allegations,	
as conclusions	230 N. (8), 675 N. (5)
as evidence	675 N. (5)
as immaterial	191-5
as irrelevant	205, 562
As the analogue of,	
the general demurrer	81, 373
the special demurrer	413-5
Denials,	
as argumentative	527-9, 686 N. (2)
as sham	562-570
The statement of,	
a cause of action	81, 564
a defense	414, 562-590
a reply	562-3, 678

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

NEGATIVE DEFENSES,

- As defenses in point of fact187-8
- As the contradictories of material propositions 199
- Devices for interposing,
 - at common law: See GENERAL ISSUE; TRAVERSE
 - under the codes
 - general denial517-526, 536-7, 621
 - specific denial517-526, 536-7
- Distinguished from affirmative defenses: See AFFIRMATIVE DEFENSES
- Joinder with affirmative defenses: See JOINDER
- Nature of187-8
- Procedural consequences of,
 - the creation of,
 - a burden of proof199, 596-612
 - a privilege of disproof613-6
 - material issues of fact589-595
- Statements of,
 - formal structure of170-2
 - procedural regularity of516-536
 - substantive adequacy of,
 - in fact552-589
 - in law548-9, 551
 - test of548, 550
- Theory of548, 550
- See ALLEGATION; ANSWER; CAUSE OF ACTION; CLAIM FOR RELIEF; COMPLAINT; DEFENSES; DENIALS; MATERIALITY; PLEADING; SHAM PLEADINGS

NEGATIVE PREGNANT: See DENIALS**NEGLIGENCE,**

- As a legal wrong47-58
- Distinguished from proximate causation48-54
- Remedies for injuries resulting from: See DAMAGES

NEW MATTER: See AFFIRMATIVE DEFENSES**NOTICE PLEADING165-6, 244 n. 4****NUISANCE,**

- As a legal wrong33, 35 N., 57, 69
- Remedies: See ABATEMENT

OBJECTION IN LAW: See DEFENSES IN POINT OF LAW**ONE FORM OF ACTION: See ACTION, The single civil; FORMS OF ACTION; FORMULARY SYSTEM****OPEN AND CLOSE, RIGHT TO,**

- Advantages of708, 717
- Incidence of708, 710-722
- Nature of708, 710

OPPOSITION, TYPES OF186-8

See CONTRADICTION; INCONSISTENCY; ISSUES

ORDERS,

- Appeals from: See APPEAL
- Final, defined: See APPEAL

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

ORDERS (Continued)

Interlocutory, defined: See **APPEAL**
See **MOTIONS**

ORIGINAL WRIT,

As defining a cause of action265, 284-6
Distinguished from,
 judicial writ 270
 summons 264
Dominance of,
 as defining the scope of an action268, 284-6
 as limiting,
 amendment: See **AMENDMENT**
 joinder of causes: See **JOINDER**
 necessity for conformity,
 of declaration to286-7, 302
 of proof to286-7
Forms of18, 264-5, 269, 272
Functions of267-273, 303
Nature of264, 267
No writ, no right264, 268, 274-284
 See **FORMS OF ACTION; FORMULARY SYSTEM**

PARTICULARS, BILLS OF: See **MOTIONS**, For bills of particulars

PERSUASION, BURDEN OF: See **PROOF**, Burden of

PETITION: See **COMPLAINT**

PLEADING,

Aider by: See **AIDER**
Alternatively521, 652, 663 N. (1)
Ambiguously: See **DENIALS**, Ambiguous; **MOTIONS**, To Make More
 Definite
Argumentatively 521
 See **INCONSISTENCY**
As preliminary to proof 536
 See **PROOF**
At law: See **COMMON LAW PLEADING; CODE PLEADING**
Burden of,
 co-incidence of, and burden of proof300-1, 596, 622
 consequences of failure to sustain631-6
 distinguished from burden of proof: See **PROOF**, Burden of
 incidence of383, 605, 617-636
Code: See **CODE PLEADING**
Common law: See **COMMON LAW PLEADING**
Conclusions: See **CONCLUSIONS**
Consistently 652
 See **CONSISTENCY; JOINDER**
Departure in: See **AMENDMENT; REPLY**
Dupliciously 409
Evasively: See **DENIALS**, Negatives Pregnant; **MOTIONS**, To Make
 More Definite
Evidence166, 527, 600, 675 N. (5)
Facts 166
Falsely: See **SHAM PLEADINGS**
Fictions: See **COMMON LAW PLEADING**

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

PLEADING (Continued)

Frivolously	562-3
Functions of	162-5, 169, 250 N., 536
Hypothetically	652, 669, 671
Inconsistently	652
Indefinitely: See MOTIONS, To Make More Definite	165-6
In equity: See EQUITY, Pleading in	
Nature of	162
Objects of	162-5, 363-4, 536
Orally	69
Order of	162-3, 415-6
Redundantly	86
Relation of, to proof: See PROOF	
Sham: See SHAM PLEADINGS	
Special: See COMMON LAW PLEADING	
Truthfulness in,	
devices for securing,	
certification	519-520, 539-540
costs	519, 558 n. 10, 540
fact pleading	521, 537
specific denial	536-7
verification	516, 517-8, 537-8, 552-9
importance of	536-7
test of	537, 569-570, 693
See ALLEGATION; CODE PLEADING; COMMON LAW PLEADING; DENIALS; PROPOSITIONS; PLEADINGS, THE	

PLEADING OVER,

After appeal	483 N. (3)
After demurrer overruled,	
of course	423, 424
with leave	187 n. 5, 424, 425

PLEADINGS, THE,

Amendment of: See AMENDMENT	
At common law,	
declaration	162
pleas: See PLEAS	
replication	162
subsequent to replication	162-3
Construction of	652
Demurrers to: See DEMURRERS; MOTIONS	
Enlargement of, by proof	631-6
Functions of	162-3, 186
In equity: See EQUITY, Pleading in	
Nature of	162, 416
Order of	162-3
Theory of: See AFFIRMATIVE DEFENSES, Statements of; CAUSE OF ACTION, Statement of a	
Under the codes	162-3, 691 N. (2)
answer: See ANSWER	
complaint: See COMPLAINT	
reply: See REPLY	
Verification of: See PLEADING, Truthfulness in	

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

PLEAS,

Dilatory	162, 509, 652
In bar, by way of,	
confession and avoidance	162, 509, 513, 652-4
traverse	162, 509, 652
Peremptory	509

PRAYER FOR RELIEF: See DEMAND FOR JUDGMENT

PRE-TRIAL HEARING,

Objects of	540-1, 543
Order upon	541, 542, 545 n. 4, 547
Procedure on	540, 541-7
Relation to trial	545, 547

PREVENTING LEGAL WRONGS,

As a remedy	13
By action	69-78
By self-help	10-12
Injunction as a means of	69, 74

PROBABILITY,

As an assertoric value of propositions	167, 201-2
See PROPOSITIONS	

PROBANDA,

Defined	199
Intermediate	202
Ultimate	199-200
See PROPOSITIONS	

PROBANTIA202-4

See PROPOSITIONS; RELEVANCY

PROBLEMS: See QUESTIONS

PROCEDURAL IRREGULARITY,

As a defect in pleading: See AFFIRMATIVE DEFENSES, Statement of; CAUSE OF ACTION, Statement of a; CLAIM FOR RELIEF, Statement of	
As a defense in point of law: See DEFENSES IN POINT OF LAW	
devices for interposing,	
the general demurrer: See DEMURRERS	
the motion: See MOTIONS	
the special demurrer: See DEMURRERS	
waiver by failure to interpose: See DEFENSES, Waiver of	
In the statement of,	
causes of action: See CAUSE OF ACTION	
defenses,	
affirmative: See AFFIRMATIVE DEFENSES	
negative: See NEGATIVE DEFENSES	
replies to defenses: See REPLY	

PROCEDURAL LAW,

Instruction in	1-9
ends of,	
intermediate	2-3
ultimate	2
means of	6-9

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

PROCEDURAL LAW (Continued)

Nature of	3-4
distinguished from substantive law	3
Objects of,	
primary	4-5, 536
Tangential	5-6

PROOF,

As the means of trying issues of fact	3
Burden of,	
as including the burden of persuasion	597, 610, 628, 698
co-incidence of, and burden of pleading	596, 597
consequences of failure to sustain	603-5, 610, 698, 704
distinguished from,	
burden of disproof	597-8
privilege of disproof	605
incidence of,	
as determined by,	
burden of pleading	596, 624, 627
other factors	624-631
as determining order of proof	597
principle of	596, 597
quantum of proof necessary to sustain,	
clear and convincing evidence	596 n. 2
preponderance of the evidence	596, 598, 605, 610
proof beyond a reasonable doubt	596, 598
relation of, to,	
burden of disproof	597-8, 627-8
burden of persuasion	596, 598, 610, 628
burden of pleading	596
privilege of disproof	605
responsibilities involved in	597, 698
Defined	202
Distinguished from disproof	199
Means of,	
allegations	600-3
evidence	599-616, 698-704
Necessity for	199
Of an elementary proposition	202-3
Probability and	201-2
Types of	202

PROPOSITIONS,

About matters of fact	168, 189-190, 200
As actual or potential knowledge	202, 212, 217-219
As probanda: See PROBANDA	
As probantia: See PROBANTIA	
Contradictory	166-168, 507
Demonstrable	201, 212
Derived	212
Distinguished from,	
allegations	169
facts	166-169, 190, 202
questions	166

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

PROPOSITIONS (Continued)

Distinguished from (Continued)

sentences	166
statements about matters of law	168, 217-218
Elementary	168, 201
elements of	168
how symbolized	168, 189-190, 218-219
Evidential,	
distinguished from material	200
impropriety of alleging	200, 205-212
General	168, 201, 212
elements of	168
how symbolized	168
How symbolized	168, 189
Immediate	201, 212
Inconsistent: See INCONSISTENCY	
Material	189-194, 212
as ultimate probanda	199
distinguished from evidential	200, 205-212
Proof of: See PROOF; RELEVANCY	
Relations between,	
contradiction: See CONTRADICTION	
inconsistency: See INCONSISTENCY	
inferential: See RELEVANCY	
Relevant: See RELEVANCY	
Values of,	
actual	167, 537
assertoric	167, 201-202

PROXIMATE CAUSE: See NEGLIGENCE

QUESTIONS,

About matters of fact	166, 217
About matters of law	167, 217-8
Dilemmatic	166-7
Distinguished from issues	166-7
General	217-8
How answered	166-7
How symbolized	166
Nature of	166
Particular	217-8
Practical	1, 4, 217-8
Theoretical	2, 4, 217
See ISSUES; OPPOSITION	

REJOINDER,

At common law	162-3
Under the codes	691

RELEVANCY,

As a relation between propositions	203-4
Distinguished from,	
admissibility	209
materiality	203-4
Indirect	204
See PROBANDA; PROBANTIA; PROPOSITIONS; PROOF	

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

RELIEF: See Remedies

REMEDIES,

Alternative	137
As a procedural conception	13, 547
See ACTIONS; SELF-HELP	
As a substantive conception	10, 13-14
See DAMAGES; PREVENTING LEGAL WRONGS; RESTITUTION; SPECIFIC REPARATION	
Equitable	14 n. 1
Legal	14 n. 1
Means of,	
awarding or denying: See DECREES; JUDGMENTS	
obtaining: See ACTIONS; SELF-HELP	
See EQUITABLE REMEDIES	

REPLEVIN,

As a form of action	15-18
distinguished from detinue	16-18
form of judgment in	18
original writ in	18
procedure in	18-19
As a means to restitution	15-26
adequacy of	23-26
As a statutory action	19-25
distinguished from common law	19
form of verdict and judgment in	22-23
procedure in	18-19
Equitable	27
See DETINUE; EJECTMENT; FORMS OF ACTION; RESTITUTION	

REPLICATION: See PLEADINGS, THE, At Common Law

REPLY,

Departure by	695, 696 N. (1), 697 N. (2)
Functions of	162, 171-2, 548, 677, 678, 695
Incorporating in complaint: See COMPLAINT, Anticipating Defenses	
Mandatory	548, 677, 678, 688, 699
waiver of	690 n. 3
Permissive	549, 677, 680, 682
Procedural regularity of	685 N. (2), 695, 696 N. (1), 697 N. (2)
Sham: See SHAM PLEADINGS	
Statutory issue	78 n. 8, 677, 682, 691 N. (1)-(2), 704
Substantive adequacy of,	
sufficiency in fact	693
sufficiency in law	691
See PLEADINGS, THE	

RES JUDICATA,

As an affirmative defense	492, 501
Doctrine of	491, 493 N. (2), 498, 501, 505
Effect of judgment as, if,	
erroneous	504
interlocutory	86

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

RES JUDICATA (Continued)

Effect of judgment as, if (Continued)	
not upon the merits	491
upon the merits	498
What judgments are upon the merits,	
judgments of dismissal with prejudice	495, 498
judgments of nonsuit	494, 497 N. (2)
judgments upon demurrers,	
for failure to state a cause of action or defense	493, 498, 501, 505
on other grounds	493, 497 N. (1)

RESTITUTION,

As a remedy	13-16
By action,	
at law: See DETINUE; EJECTMENT; REPLEVIN	
in equity	26
By self-help	11-12

SELF-HELP,

As a means to a remedy	10-13
defects of	12-13
limitations upon	11, 12, 13
Reasons for	11-12
Types of	10-12
See ACTION	

SENTENCES,

As symbolizing,	
propositions	166, 168, 189
questions	166
statements about matters of law	168, 189, 218-9
Declarative,	
complex	530
compound	530
Interrogative	166
See PROPOSITIONS; STATEMENT, About a Matter of Law	

SHAM PLEADINGS,

Devices for eliminating,	
motion for judgment	562
motion to strike out	560, 562, 645, 648, 693
use of affidavits on such motions	565, 645, 648
Distinguished from frivolous pleadings	566 n. 1
Falsity as a substantive defect of,	
a complaint	564, 568
an affirmative defense	561, 562, 645-650
a negative defense	519, 552-571
a reply	678, 693
Test of falsity	537, 569-570, 645-650

SPEAKING,

Demurrer: See DEMURRERS
Motion: See MOTIONS

SPECIFIC PERFORMANCE: See SPECIFIC REPARATION**SPECIFIC REPARATION,**

As a remedy	13
for a tort	66

[References are to pages. A capital "N" indicates a Note and a small "n", a footnote.]

SPECIFIC REPARATION (Continued)

As a remedy (Continued)	
for breach of contract	59
specific performance	59, 65
Conditions of the award of	59, 66
Injunction as a means to	59, 65, 66
See EQUITABLE REMEDIES; REMEDIES	

STATEMENT,

About a matter of law,	
distinguished from propositions	167-8, 217-9
elementary	168 n. 5, 200, 218-9
general	168, 189, 218
how symbolized: See SENTENCES	
Of a cause of action: See CAUSE OF ACTION	
Of a claim for relief: See CLAIM FOR RELIEF	
Of defenses,	
affirmative: See AFFIRMATIVE DEFENSES	
negative: See DENIALS	

SUBSTANTIVE INADEQUACY,

As a defense in point of law: See DEFENSES IN POINT OF LAW	
Of defenses,	
affirmative: See AFFIRMATIVE DEFENSES	
negative: See NEGATIVE DEFENSES	
Of replies: See REPLY	

SUBSTANTIVE LAW,

As determinative of materiality	189-191
Nature of rules of,	
as conditional imperatives	186
as prescribing the factual conditions of legal action	186-7, 201 n. 3
Relation to procedural law	1-2
Substantive rights, duties and wrongs: See LEGAL RIGHTS AND DUTIES; LEGAL WRONGS	

SUIT: See **ACTION; EQUITY**

SUMMARY JUDGMENT,

Actions in which, may be rendered	570, 571-2, 577, 587
Motion for, when granted	570, 573-589
Objects of procedure	577-8, 588
Procedure upon motions for	570-3
See JUDGMENTS; MOTIONS	

SUMMONS: See **ACTION, Devices for instituting**

SYLLOGISM,

A pleading as a	170-2, 366
Nature of	219
Practical	219
Theoretical	219

SYMBOLS,

Nature of	166
Sentences: See SENTENCES	
Words,	
common names	166, 189, 218
proper names	166, 168, 218

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

THEORY PLEADING,

- At common law285-6, 305
- Under the codes326-362
- See AFFIRMATIVE DEFENSES, Statements of; AMENDMENT,
Changing Cause of Action; CAUSE OF ACTION, Statement of a;
REPLY, Departure by

TRAVERSE,

- General: See GENERAL ISSUE
- Special 509
- Specific509-510, 512-3
- See DENIALS; NEGATIVE DEFENSES

TRESPASS,

- As a form of action,
 - declaration in266, 290-1
 - distinguished from case 16
 - original writ in 269
 - scope of16, 277-280, 287, 289-290, 292-6, 333, 337
- As a legal wrong13, 67, 328
- As a means to compensatory damages13, 328

TRESPASS ON THE CASE: See CASE, ACTION ON THE

TRIAL,

- Amendments during and after: See AMENDMENT
- End of 536
- Mistrial594 N. (1), 683
- Order of710-712
- When necessary508, 548-589

TROVER,

- As a form of action,
 - declaration in 322
 - distinguished from trespass294-6
 - scope of294-6, 337
- See CONVERSION

TRUTHFULNESS IN PLEADING: See PLEADING, Truthfulness in

ULTIMATE FACTS: See PROPOSITIONS, Material

VARIANCE,

- Between pleading and proof: See AMENDMENT
- Between writ and declaration: See ORIGINAL WRIT

VERDICT,

- Aider by: See AIDER
- Direction of: See MOTIONS, For directed verdict
- Distinguished from judgment 80
- Forms of22, 23
- Functions of167-8
- General167 n. 3

[References are to pages. A capital "N" indicates a Note
and a small "n", a footnote.]

VERDICT (Continued)

Judgments on23, 80
Special167 n. 3

VERIFICATION: See Pleading, Truthfulness in

WASTE,

As a form of action269-272
original writ in272
As a legal wrong269

WORDS: See SYMBOLS

END OF VOLUME



